

10. 83-5424-CSY
Status: GRANTED
CAPITAL CASE

Title: Glen Burton Ake, Petitioner
v.
Oklahoma

Court: Court of Criminal Appeals
of Oklahoma

Docketed:
September 13, 1983

Counsel for petitioner: Sims, Charles S., Spitzer, Arthur B.

Counsel for respondent: Lee, David W.

entry	Date	Note	Proceedings and Orders
1	Aug 11 1983		Application for extension of time to file petition and order granting same until September 13, 1983 (White, August 12, 1983).
2	Sep 13 1983	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Oct 15 1983		Order extending time to file response to petition until November 12, 1983.
6	Nov 16 1983		Brief of respondent Oklahoma in opposition filed.
7	Nov 17 1983		DISTRIBUTED. December 2, 1983
8	Nov 30 1983	X	Reply brief of petitioner Glen B. Ake filed.
10	Dec 5 1983		REDISTRIBUTED. December 9, 1983
12	Dec 12 1983		REDISTRIBUTED. January 6, 1984
14	Jan 9 1984		REDISTRIBUTED. January 13, 1984
16	Jan 16 1984		REDISTRIBUTED. January 20, 1984
18	Feb 10 1984		REDISTRIBUTED. February 17, 1984
20	Feb 21 1984		REDISTRIBUTED. February 24, 1984
22	Feb 27 1984		REDISTRIBUTED. March 2, 1984
24	Mar 9 1984		REDISTRIBUTED. March 16, 1984
26	Mar 19 1984		Petition GRANTED. *****
28	Mar 30 1984		Order extending time to file brief of petitioner on the merits until June 2, 1984.
29	Jun 1 1984	G	Motion of New Jersey Department of the Public Advocate for leave to file a brief as amicus curiae filed.
30	Jun 1 1984	G	Motion of American Psychiatric Association for leave to file a brief as amicus curiae filed.
31	Jun 1 1984	G	Motion of Office of the Public Defender of Oklahoma County, Oklahoma, et al. for leave to file a brief as amici curiae filed.
32	Jun 1 1984	G	Motion of American Psychological Association, et al. for leave to file a brief as amici curiae filed.
33	Jun 1 1984	G	Motion of National Legal Aid and Defender Association, et al. for leave to file a brief as amici curiae filed.
34	Jun 11 1984		Motion of New Jersey Department of the Public Advocate for leave to file a brief as amicus curiae GRANTED.
35	Jun 11 1984		Motion of American Psychiatric Association for leave to file a brief as amicus curiae GRANTED.
36	Jun 11 1984		Motion of American Psychological Association, et al. for leave to file a brief as amici curiae GRANTED.
37	Jun 2 1984		Joint appendix filed.
38	Jun 2 1984		Brief of petitioner Glen B. Ake filed.
39	Jun 18 1984		Motion of Office of the Public Defender of Oklahoma

ntry	Date	Note	Proceedings and Orders
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40	Jun 18 1984		County, Oklahoma, et al. for leave to file a brief as amici curiae GRANTED. Motion of National Legal Aid and Defender Association, et al. for leave to file a brief as amici curiae GRANTED.
41	Aug 10 1984		Record filed.
43	Aug 9 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
44	Aug 20 1984	Brief of respondent Oklahoma filed.	
45	Aug 28 1984		CIRCULATED.
46	Aug 28 1984		SET FOR ARGUMENT. Wednesday, November 7, 1984. (3rd case)
47	Oct 30 1984	X Reply brief of petitioner Glen B. Ake filed.	
48	Oct 30 1984		Lodging received.
49	Nov 7 1984		ARGUED.

No. 83-5424 11

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

=====

GLEN BURTON AKE,
Petitioner,
-against-
THE STATE OF OKLAHOMA,
Respondent.

=====

ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

=====

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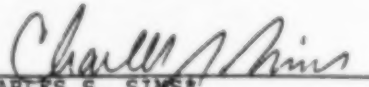
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September 13, 1983

962

For the reasons stated, the Petitioner requests
that this Motion be granted.

Respectfully submitted,


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I
QUESTIONS PRESENTED

1. Where an indigent defendant's sanity at the time of the offense is seriously in issue, can a State constitutionally refuse to provide any opportunity whatsoever for him to obtain expert psychiatric examination necessary to prepare and establish his insanity defense and to present evidence in mitigation of punishment and in rebuttal of the alleged aggravating offense of predicted future violence proven by the state through psychiatric testimony?

2. Can a State constitutionally force a criminal defendant to be heavily sedated with Thorazine while attending the criminal proceedings against him in the absence of any evidence that petitioner would fail to conduct himself properly in court?

TABLE OF CONTENTS

QUESTIONS PRESENTED	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	
Course of Proceedings	2
Facts Relevant to the Questions Presented	3
REASONS FOR GRANTING THE WRIT	11
I. The Constitution mandates that Oklahoma provide petitioner, an indigent criminal defendant, with the opportunity to establish by expert psychiatric evidence his insanity defense	11
II. Denial of petitioner's request for expert psychiatric assistance violated his right to individualized sentencing	16
III. The prejudice to petitioner resulting from his appearance throughout his trial while forcibly drugged with the sedative Thorazine is constitutionally offensive	17
CONCLUSION	21
INDEX TO APPENDIX	22

TABLE OF AUTHORITIES

Cases.	Page
<u>Alvord v. Wainright</u> , 564 F. Supp. 459 (M.D. Fla. 1983)	12
<u>Barefoot v. Estelle</u> , ___ U.S. ___, 51 U.S.L.W. 5189 (U.S. 1983)	11, 17
<u>Blake v. Zant</u> , 513 F. Supp. 772 (S.D. Ga. 1981)	12
<u>Bush v. McCollum</u> , 231 F. Supp. 560 (N.D. Tex. 1964), <u>aff'd</u> , 344 F.2d 672 (5th Cir. 1965)	12
<u>Bush v. Texas</u> , 372 U.S. 586 (1963)	11
<u>Chaffin v. Stynchcombe</u> , 412 U.S. 17 (1972)	19
<u>Eddings v. Oklahoma</u> , 455 U.S. 586 (1978)	16
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976)	16
<u>Griffin v. Illinois</u> , 351 U.S. 12 (1956)	11
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	16
<u>Owsley v. Peyton</u> , 368 F.2d 1002 (4th Cir. 1966)	14
<u>Proffitt v. Florida</u> , 428 U.S. 242 (1976)	16
<u>Reilly v. Barry</u> , 250 N.Y. 456, 166 N.E. 165 (1929)	11
<u>Roberts v. Louisiana</u> , 431 U.S. 633 (1977)	16
<u>Smith v. Baldi</u> , 344 U.S. 561 (1953)	16, 17
<u>Smith v. Enimoto</u> , 615 F.2d 1251 (9th Cir. ___), <u>cert. denied</u> , 449 U.S. 866 (1980)	12
<u>Smith v. Estelle</u> , 445 F. Supp. 647 (N.D. Tex. 1977), <u>aff'd</u> , 602 F.2d 694 (5th Cir. 1979), <u>aff'd</u> , 451 U.S. 454 (1981)	17
<u>State v. Ake</u> , 663 P.2d 1 (Okla. Cr. App. 1983)	1, 2-3, 9
<u>State v. Chandler</u> , 72 F. Supp. 230 (D. Mass. 1947)	18

<u>Cases.</u>	<u>Page</u>
<u>State v. Margott</u> , 492 F.2d 239 (Wash. App. 1971)	18
<u>State v. Murphy</u> , 56 Wash.2d 761, 355 P.2d 323 (Wash. 1960)	18
<u>Stidham v. State</u> , 507 P.2d 1312 (Okla. Cr. App. 1973)	6, 15
<u>Tims v. State</u> , 525 P.2d 1227 (Okla. Cr. App. 1974)	6, 15
<u>United States v. Edwards</u> , 488 F.2d 1154 (5th Cir. 1974)	14
<u>United States v. Fessel</u> , 531 F.2d 1275 (5th Cir. 1976)	14
<u>United States v. Lincoln</u> , 542 F.2d 746 (8th Cir. 1976), cert. denied, 429 U.S. 1006 (1977)	14
<u>United States v. Taylor</u> , 437 F.2d 371 (4th Cir. 1971)	14
<u>Westbrook v. Zant</u> , 704 F.2d 1487 (11th Cir. 1983)	16
<u>Williams v. Martin</u> , 618 F.2d 1021 (4th Cir. 1980)	12
<u>Woodson v. North Carolina</u> , 428 U.S. 280 1976)	16
<u>Zant v. Stephens</u> , U.S. ___, 51 U.S.L.W. 4891 (U.S. 1983)	16

<u>Statutes.</u>	<u>Page</u>
18 U.S.C. § 3006A(e) (Supp. III 1979)	14
28 U.S.C. § 1257(3) (19)	1
21 O.S. § 701.7	2
21 O.S. § 701.9	2
21 O.S. § 701.10	2
21 O.S. § 701.11	2
21 O.S. § 701.12	2
21 O.S. § 701.13	2, 9
22 O.S. (1971) § 1171	2, 3, 5
22 O.S. § 1175.2	2, 5
Ala. Code §§ 12-19-252, 15-12-21(b) (1977)	14
Alaska Stat. § 18.85.100 (Supp. 1980)	14
Ariz. Rev. Stat. Ann. § 13-4013(B) (1978)	13
Ark. Stat. Ann. § 43-2419 (1977)	14
Cal. Penal Code § 987.2 (Deering 1980)	14
Cal. Penal Code § 987.9 (Deering 1980)	13
Colo. Rev. Stat. §§ 18-1-403, 21-1-105 (1978)	14
Del. Code Ann. tit. 29, § 4605 (1979)	14
Fla. Stat. Ann. § 925.035(1) (West 1973)	14
Ga. Code Ann. § 27-3204 (1978)	14
Ill. Ann. Stat. ch. 34, § 5609 (Smith-Hurd 1980)	14
Ill. Ann. Stat. ch. 38, § 113-3(d) (Smith-Hurd 1980)	13
Iowa Code Ann. § 813.2 (1979)	13
Kan. Stat. Ann. § 22-4508 (1974)	13
Ky. Rev. Stat. Ann. §§ 31.110(1)(b), 070(3) (Baldwin 1975)	14
La. Rev. Stat. Ann. § 15:571.11-(A) (West 1980)	14
Md. Ann. Code art. 27A § 6(d) (1976)	14

	<u>Page</u>
Minn. Stat. Ann. § 611.21 (West 1979)	13
Miss. Code Ann. § 99-15-17 (1979)	14
Mo. Rev. Stat. § 600.150 (1978)	13
Mont. Rev. Codes Ann. § 46-8-2-1 (1979)	14
Neb. Rev. Stat. § 29-1804.12 (1979)	14
Nev., Rev. Stat. § 7.135 (Supp. 1980)	13
N.C. Gen. Stat. § 7A-454 (1969)	13
N.D. Cent. Code § 29-07-01.1 (1974)	14
N.H. Rev. Stat. Ann. § 604-A:6 (1974)	13
N.M. Stat. Ann. §§ 31-16-3(A), -8 (1978)	14
N.Y. County Law § 722-c (McKinney 1979)	13
Ohio Rev. Code Ann. § 2941.51 (Page 1980)	14
Or. Rev. Stat. § 135.055(4) (1979)	13
Pa. Stat. Ann. tit. 19, § 1501 (Purdon 1980)	13
S.C. Code § 17-3-80 (1979)	14
S.D. Comp. Laws Ann. § 23A-40-8 (1979)	14
Tenn. Code Ann. § 40-2023 (1975)	14
Tex. Stat. Ann. art. 26.05 § 1 (Vernon 1979)	13
Utah Code Ann. §§ 77-64-1(3), -7 (1978)	14
Va. Code § 19.2-163 (1980)	14
Vt. Stat. Ann. tit. 13, §§ 5205, 5231(2) (1974)	14
Wash. Rev. Code Ann. § 36.26.090 (1980)	14
W. Va. Code § 51-11-8 (1980)	13
Wyo. Stat. §§ 7-1-110(a)(ii), -115(b) (1977)	14

The Constitution.

Sixth Amendment	2
Eighth Amendment	2
Fourteenth Amendment	2

Legislative History.

	<u>Page</u>
1964 U.S. Cong. Code & Ad. News 2996	15
110 Cong. Rec. 445, 18521 (1964)	13
109 Cong. Rec. 14224 (1963)	13
<u>Commentary and Miscellaneous.</u>	
ABA Standards relating to the Administration of Criminal Justice, § 1.5 (Draft 1968)	14
A. Goldstein and E. Pine, The Indigent Accused, the Psychiatrist, and the Insanity Defense, 110 U. Pa. L. Rev. 1061 (1962)	14
Note, The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 Cornell L. Rev. 632 (1970)	12
W. Brennan, Law and Psychiatry Must Join in Defending Mentally Ill Defendants, 49 A.B.A. J. 239 (1963)	14
Note, Refusal to Provide Expert Witness for Indigent Defendant denies Equal Protec- tion, 59 Wash. U.L.Q. 317 (1981)	14
Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054 (1963)	14
Propriety of Criminal Trial of One under Influence of Drugs or Intoxicants at time of Trial, 83 A.L.R.2d 1067	19
Report of the Attorney General's Comm'n on Poverty and the Administration of Federal Criminal Justice (1963)	15, 16

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Petitioner,
-against-
THE STATE OF OKLAHOMA,
Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

=====

Petitioner, Glen B. Ake, prays that a writ of certiorari issue to review the decision of the Court of Criminal Appeals of Oklahoma on April 12, 1983, affirming his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma is reported at 663 P.2d 1 (Okla. Cr. App. 1983) and is set out at pp. A.1-12 of the Appendix.

JURISDICTION

The judgment of the Court of Criminal Appeals of Oklahoma was entered on April 12, 1983, and rehearing was denied on June 15, 1983 (A-18). An order extending until September 13, 1983 petitioner's time to file this petition for Writ of Certiorari was entered on August 12, 1983 by The Honorable Byron White, Associate Justice of the Supreme Court of the United States (A-19). No date for petitioner's execution has yet been set. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (19).

IN THIS CASE CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence;

the eighth amendment to the Constitution which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

[N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following Oklahoma statutes, O.S. 21 § 701.7, O.S. 21 § 701.9, O.S. 21 § 701.10, O.S. 21 § 701.11, O.S. 21 § 701.12, O.S. 21 § 701.13, O.S. 22 (1971) § 1171, 22 O.S. § 1175.2, which are set out at pages A.13 - 17 of the Appendix.

STATEMENT OF THE CASE

Course of Proceedings.

Petitioner and another person were charged with two counts of murder in the first degree and two counts of shooting with intent to kill resulting from events that transpired on October 15, 1979. On June 26, 1980, petitioner was convicted by a jury of two counts of capital murder and two counts of shooting with intent to kill. On July 25, 1980, petitioner's motion for a new trial was denied and he was sentenced to death for each of the murder charges and to five hundred year prison terms for each count of shooting with intent to kill.

On April 12, 1983, the Court of Criminal Appeals of Oklahoma affirmed the conviction and sentence. Ake v. State, 663 P.2d 1 (1983). Rehearing was denied on June 15, 1983. On August 12, 1983, Justice White extended until September 13, 1983 petitioner's time to file a petition for certiorari.

FACTS RELEVANT TO THE QUESTIONS PRESENTED

- (1) The Challenge by petitioner, an indigent, to Oklahoma's refusal either to appoint a psychiatrist or provide funds for him to obtain a private psychiatrist to evaluate his mental state at the time of the offense and his forcible sedation with Thorazine by the State during trial.

On October 15, 1979, following two days of heavy drinking and drug use, petitioner, accompanied by another man, forcibly entered the home of the Reverend Richard Douglass in Canadian County, Oklahoma. The Reverend, his wife and their two teenage children, Richard and Leslie, were at home. After burglarizing the house, petitioner bound, gagged and shot the members of the Douglass family. The Reverend and Mrs. Douglass died as a result. Petitioner was apprehended in Colorado in November 1979 and extradited to Oklahoma to face criminal charges.

Three months later, in February 1980 at petitioner's arraignment in Oklahoma, the presiding judge sua sponte ordered a psychiatric evaluation of petitioner's mental state and competency to stand trial. Petitioner was sent for approximately two months of observation to a state mental institution, Eastern State Hospital, in Vinita, Oklahoma. Pursuant to Oklahoma statute, the staff of the mental health facility examined petitioner's mental state only with respect to his then present sanity and competence to stand trial. 22 O.S. (1971) § 1171 (A. 16-17).
Petitioner Found Insane at Competency Hearing.

The Court held a special hearing on April 10, 1980 to determine petitioner's competency to stand trial. At the

competency hearing, two psychiatrists testified to petitioner's lack of sanity. Dr. William Allan, a court appointed psychiatrist, had examined petitioner and had spoken with another psychiatrist, Dr. R.D. Garcia, the forensic psychiatrist at the Eastern State Hospital where petitioner had been committed for observation at the direction of the court. Dr. Allan gave the following testimony regarding petitioner:

"he is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia -- chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis, that he is dangerous."

[Transcript April 10, 1980 (A.22)] Dr. Allan's recommendation was that:

"[B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within -- I believe -- the State Psychiatric Hospital system."

Dr. Allan, when questioned about whether petitioner could then, six months following the offense, tell right from wrong responded that petitioner could not:

- Q. Do you have an opinion as to whether Mr. Ake at this time understands the significance or the difference between right and wrong?
- A. At this time?
- Q. At this time?
- A. I have to give a qualified opinion because - uh - all of his statements are couched in terms of his religious beliefs which are delusional and his concept of right and wrong does not accept the Court's authority of government.
- Q. I see.
- A. So, he just doesn't accept what the rest of us live by . . .
- Q. [D]o I interpret your answer to say that in terms of society's judgment as between right and wrong, whatever things he may have are not on that level but are somewhat different?
- A. Yes. His world would be a different dimension. He does not, as I understand it, accept the ordinary rules of right and wrong.

[Hearing transcript 4/10/80 (A.23)].

Dr. Jack Enos, a medical doctor with 29 years experience, testified that he had not examined petitioner long enough to form an opinion as to whether petitioner was

then capable of distinguishing right from wrong (id.), but he did give his opinion that petitioner was mentally ill, dangerous and should be treated within the confines of a maximum security hospital (id. 24). At the April 10, 1980 competency hearing, neither psychiatrist was asked his opinion as to whether petitioner could tell right from wrong at the time of the offense.

After hearing the psychiatric testimony, the Court found petitioner to be mentally ill and in need of care and treatment and accordingly ordered petitioner recommitted to the state mental hospital. 22 O.S. §§ 1171, 1175.2 (A.16 - 17). Pursuant to Oklahoma statute, the criminal proceedings against petitioner were temporarily suspended. Id.

Petitioner Subsequently Adjudicated Competent To Stand Trial.

After seven weeks at the Eastern State Hospital in Vinita, Oklahoma, the facility's forensic psychiatrist, Dr. R.D. Garcia, wrote a letter, dated May 22, 1980, to the court expressing his opinion that petitioner was competent to stand trial (A.20). Dr. Garcia recommended that Mr. Ake be maintained on 200 milligram doses of the sedative Thorazine, to be administered three times daily (id.). Without any further inquiry, on May 27, 1980 the Court reinstated the criminal charges against petitioner.

The Oklahoma court appointed counsel to represent petitioner because of his indigency. At a pretrial conference held on June 13, 1980, petitioner's counsel informed the Court that petitioner would plead not guilty by reason of insanity. Counsel also informed the Court that he needed the assistance of a psychiatrist to examine petitioner with respect to his mental condition at the time of the offense in order to prepare an adequate insanity defense [June 13 Transcript (A. 26-30)]. During petitioner's four-month stay at the Oklahoma state mental health facility, no such

examination had been performed. Counsel asked that, in view of petitioner's indigency, the Court either appoint a psychiatrist to examine petitioner or provide petitioner with the funds necessary to hire a private psychiatrist to do so. [Transcript of hearing dated June 13, 1980 (A.27-31)].

Petitioner's counsel argued that the psychiatric testimony at the competency hearing raised a substantial question of petitioner's sanity at the time of the offense and that "Glen Ake, indigent [with] court-appointed counsel, still under the Constitution is entitled to monies for a psychiatrist as if he were another Cullin Davis who had the money to pay for it." [Id. (A.26)] Petitioner's counsel made it clear that

"[T]he man does not have any money . . . he was appointed legal counsel. Thus, in order to properly give him the defense necessary, then when the court-appointed legal counsel, the thing that stems from that would be a meagre amount of funds to prepare for the case"

Id. at 21, 24 (A.28).

The trial court denied petitioner's request, refusing to appoint a psychiatrist or to provide funds for petitioner to hire one. The Court justified its action by noting that provision of a psychiatric expert was not "specifically authorized by statute" and that the practice in Oklahoma, as determined in Stidham v. State, 507 P.2d 1312 (Okla. Ct. App. 1973) and Tims v. State, 525 P.2d 1227, was to deny indigent defendants that right. Id. (A.31). Recognizing the relevancy and materiality of the requested psychiatric examination to petitioner's insanity defense, the Court ruled that petitioner's counsel could "have the defendant available, if you are able to arrange [the psychiatric examination] in some other manner." (Id.)

Petitioner Was Able To Introduce No Psychiatric Testimony In Support Of His Insanity Defense At Trial.

In one day, June 24, 1980, the evidence of both the prosecution and the defense was presented to the jury. No psychiatric evidence relating to petitioner's mental state at the time of the offense was introduced because Oklahoma refused to provide petitioner with any opportunity to have such a psychiatric evaluation performed, despite his indigency. Petitioner thus received no psychiatric examination as to his sanity at the time of the offense and no psychiatric assistance in preparing and establishing his insanity defense.

At trial, the defense called the three psychiatrists the state had relied on to establish petitioner's incompetency and subsequent competency to stand trial in the Spring of 1980. In his trial testimony, Dr. Enos diagnosed petitioner as "paranoid schizophrenic and mentally ill" (*id.* at 575 (A.40)). Dr. Enos also testified that he had learned from petitioner's mother that petitioner had a history of mental problems [(*id.* at 579 (A.44))]. Dr. Garcia also testified at trial that petitioner was mentally ill [(*id.* at 592 (A. 47))]. None of these psychiatrists was able to give an opinion about petitioner's sanity at the time of the offense because they had not examined him for that purpose.

Nevertheless, the prosecution repeatedly emphasized to the jury that the psychiatrists had no opinion of petitioner's sanity at the time of the offense, fueling the unwarranted inference that petitioner's insanity defense was without merit. The prosecution pressed each psychiatrist on whether he had performed or seen the results of examinations diagnosing petitioner's mental state in October 1979 -- the very examinations petitioner had requested and Oklahoma had denied. [Transcript of trial, June 24, 1980, at pp. 564, 566, 584, 597, 602 (A.34, 36, 45, 49, 51).]

Petitioner Was Forcibly Sedated Throughout His Trial.

Pursuant to instructions of a psychiatrist, Dr. R. D. Garcia, employed by the Oklahoma state mental health facility at Vinita where petitioner had been committed for four months, petitioner was forcibly sedated with 600 milligrams of Thorazine per day throughout his trial. "Thorazine is a major tranquilizer used in people who are psychotic, as opposed to neurotic." [Trial testimony of Dr. Enos, transcript of June 24, 1980, p. 574 (A.39).]

Petitioner did not testify at trial. Indeed, he "remained mute throughout the trial . . . refused to converse with his attorneys and stared straight ahead during both stages of the proceedings." *Ake v. State*, 663 P.2d 1 (Ok. Cr. App. 1983). Petitioner's counsel objected to the heavy sedation with Thorazine during the trial because it rendered petitioner "zombie"-like, prejudicing him before the jury and rendering him incapable of reacting to the testimony of witnesses against him and unable to assist his attorneys [e.g., Transcript of Trial, pp. 659-670 (A.52-63)].

At the conclusion of the criminal responsibility phase of the trial, the jury returned a verdict of guilty as to the two counts of first degree murder and two counts of shooting with intent to kill.

At The Sentencing Stage Of Petitioner's Trial, He Was Denied The Assistance Of An Expert Witness But Oklahoma Relied On Expert Psychiatric Testimony To Prove An Aggravating Circumstance Necessary To Support Imposition Of The Death Sentence.

The State of Oklahoma relied on the testimony of psychiatrists, especially that of Dr. Garcia, to establish an aggravating circumstance, *i.e.*, that petitioner would predictably commit future acts of violence. [E.g., *id.* at 601, 714, 716 (A.50, 64, 65).] Petitioner had no expert psychiatric witness to rebut the State's psychiatric testimony. Moreover, petitioner's counsel was deprived of the expert psychiatric assistance necessary to prepare and

establish mitigating evidence, such as petitioner's mental state at the time of the offense or the psychological effects of the child abuse petitioner suffered at the hands of his father.

The jury found three aggravating circumstances,* including petitioner's supposed likelihood of future dangerousness, and no mitigating circumstances. The jury sentenced petitioner to death.

The trial court sentenced defendant on July 25, 1980 to death for each of the murder counts and to a term of five hundred years in prison for each of the two counts of shooting with intent to kill.

Petitioner's Appeal Of The Denial Of A Psychiatrist And Forcible Sedation During Trial.

The Oklahoma Court of Criminal Appeals affirmed the judgment and sentence. Ake v. State, 663 P.2d 1 (Okla. Cr. App. 1983). On appeal, petitioner contended that "he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist and a court-appointed investigator as incident to his constitutional rights of effective assistance of counsel and availability of compulsory process for obtaining witnesses." Id. at 6. The Oklahoma Court of Criminal Appeals disagreed:

"The unique nature of capital crimes notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes."

Id.** The Court noted the obvious fact that petitioner had

* The aggravating circumstances found were that the crime was committed to avoid arrest; the petitioner was likely to commit future acts of violence; the murders were especially cruel, heinous and atrocious.

** After addressing the merits of petitioner's appellate claim, the court indicated that "[t]he argument was not preserved in the motion for new trial. It was thereby waived." However, in capital cases, by Oklahoma statute, O.S. 21 § 701.13 (A.15), the "Oklahoma Court of Criminal Appeals shall consider the punishment as

(Footnote Continued)

"failed to establish any doubt of his sanity at the time the crime was committed", but ignored the fact that petitioner attempted to do so -- but was prevented by the policies of the Oklahoma court.

The Oklahoma Court of Criminal Appeals emphasized, as the prosecution had at petitioner's trial, the inability of any of the psychiatrists who testified to give "an opinion of the state of appellant's mental condition prior to the time they observed him." Yet this failure of evidence resulted solely from petitioner's indigency: Oklahoma refused to appoint a psychiatrist to evaluate petitioner's mental condition at the time of the offense and he lacked the funds to retain one.

Petitioner also contended on appeal that the Thorazine rendered him unable to understand the proceedings against him and to assist counsel with his defense. He also complained that his drugged and drowsy demeanor resulting from sedation with Thorazine prejudiced him in the eyes of the jury. The Court of Criminal Appeals held that the Thorazine did not impinge on petitioner's rights, relying on Dr. Garcia's May 22, 1980 letter which stated that under the influence of Thorazine petitioner was competent to stand trial. Id. at 6. With respect to petitioner's "abnormal" behavior -- "remaining mute throughout trial, refusing to converse with his attorneys, staring straight ahead during both stages of the proceedings" -- the Court of Appeals refused to concede any possibility that the Thorazine was responsible. Instead, the Court merely hypothesized that perhaps:

[T]he defense of insanity interposed by defendant fostered such behavior on his

(Footnote Continued)

well as any errors enumerated by way of appeal." (emphasis added). The Court of Criminal Appeals addressed the merits of petitioner's claim on appeal because it was required, under Oklahoma law, to do so in a capital case despite an otherwise cognizable procedural waiver.

part Notwithstanding the appellant's 'abnormal' behavior at trial, the jury determined that he was sane.

Id. at n.4. There is at least enough doubt as to the cause of petitioner's "abnormal" and zombie-like trial demeanor to raise a reasonable doubt as to his ability to act differently under the influence of Thorazine. There is no basis in the record, however, to conclude that petitioner's zombie-like state was not induced by Thorazine but was instead "feigned" in order to advance his defense of insanity.

REASONS FOR GRANTING
THE WRIT

- I. THE CONSTITUTION MANDATES THAT OKLAHOMA PROVIDE PETITIONER, AN INDIGENT CRIMINAL DEFENDANT, WITH THE OPPORTUNITY TO ESTABLISH BY EXPERT PSYCHIATRIC EVIDENCE HIS INSANITY DEFENSE.

Where an indigent criminal defendant's mental state at the time of the offense is substantially in dispute, a state has the constitutional obligation to provide expert psychiatric assistance in the preparation and establishment of his insanity defense.*

- A. A Criminal Accused's Right To Expert Psychiatric Assistance In Appropriate Cases Is Founded In The Constitution.

This Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion, Black,

* This Court has previously granted certiorari on this question. Bush v. Texas, 372 U.S. 586 (1963). The Court did not address the question, however, because subsequent developments made it unnecessary with respect to that petitioner. The case was vacated and remanded for a new trial in which psychiatric evidence would be considered. Id. at 589-90. This Court again expressed concern about this question at the oral argument of the case decided last term, Barefoot v. Estelle, ___ U.S. ___, 51 U.S.L.W. 5189 (1983).

J.). This precept is most compelling when indigency alone would prevent an accused from introducing evidence to negate criminal responsibility.

[It] is a matter of common knowledge, that upon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair advantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.

Reilly v. Barry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) (Cardozo, C.J.).

The constitutional right of a criminal accused to expert psychiatric assistance in establishing the insanity defense has been consistently safeguarded by the federal courts. State convictions obtained in derogation of this right must be reversed. Alvord v. Wainwright, 564 F. Supp. 459, 484 (M.D. Fla. 1983) ("[U]nder appropriate circumstances, a defendant must be provided a psychiatric examination when such is necessary to a reasonable investigation of the insanity defense."); Blake v. Zant, 513 F. Supp. 772, 787 (S.D. Ga. 1981) ("[I]n a capital case, a defendant whose sanity at the time of the crime is fairly in question, has at a minimum a constitutional right to at least one psychiatric examination at state expense."); Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), aff'd, 344 F.2d 672 (5th Cir. 1965).

Various constitutional guarantees are implicated when a criminal accused is denied psychiatric assistance.

In order for [defendant] in the instant case to have the effective aid of counsel, it was necessary for his counsel to have the assistance of a qualified psychiatrist; a trial, without expert evidence as to sanity, which found him sane and resulted in a life sentence is so lacking in fairness as to be a denial of liberty without due process of law, contrary to the Fourteenth Amendment.

Id. at 565.

In addition to equal protection, due process, and effective assistance of counsel concerns, equally important Sixth Amendment rights to compulsory process for obtaining witness and confrontation of adverse witnesses require that indigent criminal defendants be provided with expert psychiatric assistance where appropriate. Note, The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 Cornell L. Rev. 632, 641-43 (1970); accord Smith v. Enimoto, 615 F.2d 1251 (9th Cir. 1980), cert denied sub nom., Smith v. Director, 449 U.S. 866 (1980) (indigent's constitutional right to investigative services funded by the state); Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980) (reversing murder conviction where state denied indigent assistance of forensic pathologist).

Congress, too, has recognized the need for the government to provide indigents with expert assistance and has responded by enacting 18 U.S.C. § 3006A(e) (Supp. III 1979). That "Act was designed to implement the Sixth Amendment guarantee of effective assistance of counsel." 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14224 (1963) (recognizing the need for expert psychiatric assistance). Similarly, at least forty states currently provide indigents with varying degrees of expert assistance at state expense.*

* Fifteen state statutes specifically mention expert assistance, although three states -- California, Illinois, and Pennsylvania -- limit express application of expert assistance to capital cases. Ariz. Rev. Stat. Ann. § 13-4013(B) (1978); Cal. Penal Code § 987.9 (Deering 1980); Ill. Ann. Stat. ch. 38, § 113-3(d) (Smith-Hurd 1980); Iowa Code Ann. § 813.2(1979); Kan. Stat. Ann. § 22-4508 (1974); Minn. Stat. Ann. § 611.21 (West 1979); Mo. Rev. Stat. § 600.150 (1978); Nev. Rev. Stat. § 7.135 (Supp. 1980); N.H. Rev. Stat. Ann. § 604-A:6 (1974); N.Y. County Law § 722-c (McKinney 1979); N.C. Gen. Stat. § 7A-454 (1969); Or. Rev. Stat. § 135.055(4) (1979); Pa. Stat. Ann. tit. 19, § 1501 (Purdon 1980); Tex. Stat. Ann. art. 26.05 § 1 (Vernon 1979); W. Va. Code § 51-11-8 (1980).

(Footnote Continued)

Provision of expert psychiatric assistance to indigents has been endorsed by the American Bar Association and commentators. ABA Standards Relating to the Administration of Criminal Justice § 1.5 (Draft 1968); Brennan, W. Law and Psychiatry Must Join in Defending Mentally Ill Criminals, 49 A.B.A. J. 239, 241-42 (1963); A. Goldstein and E. Fine, "The Indigent Accused, the Psychiatrist, and the Insanity Defense," 110 U. Pa. L. Rev. 1061, 1080 (1962); Note, Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection, 59 Wash. U.L.Q. 317 (1981); Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054, 1060 (1963).

Oklahoma's uniform refusal to assist indigents, as a policy matter irrespective of the facts of individual cases, is out of step with the prevailing norms of criminal process. Perhaps as many as nine other states also refuse to assist indigents. (See note pp. 13-14).

Courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." United

(Footnote Continued)

The remaining state statutes deal generally with reimbursing private court appointed counsel for expenses necessarily incurred in the representation of an indigent criminal defendant. California and Illinois, in addition to the explicit statutes cited above, also have general reimbursement statutes. Ala. Code §§ 12-19-252, 15-12-21(b) (1977); Alaska Stat. § 18.85.100 (Supp. 1980); Ark. Stat. Ann. § 43-2419 (1977); Cal. Penal Code § 987.2 (Deering 1980); Colo. Rev. Stat. §§ 18-1-403, 21-1-105 (1978); Del. Code Ann. tit. 29, § 4605 (1979); Fla. Stat. Ann. § 925.035(1) (West 1973); Ga. Code Ann. § 27-3204 (1978); Ill. Ann. Stat. ch. 34, § 5609 (Smith-Hurd 1980); Ky. Rev. Stat. Ann. §§ 31.110(1)(b), 070(3) (Baldwin 1975); La. Rev. Stat. Ann. § 15:571.11-(A) (West 1980); Md. Ann. Code art. 27A § 6(d) (1976); Miss. Code Ann. § 99-15-17 (1979); Mont. Rev. Codes Ann. § 46-8-2-1 (1979); Neb. Rev. Stat. § 29-1804.12 (1979); N.M. Stat. Ann. §§ 31-16-3(A), -8 (1978); N.D. Cent. Code § 29-07-01.1 (1974); Ohio Rev. Code Ann. § 2941.51 (Page 1980); S.C. Code § 17-3-80 (1979); S.D. Comp. Laws Ann. § 23A-40-8 (1979); Tenn. Code Ann. § 40-2023 (1975); Utah Code Ann. §§ 77-64-1(3), -7 (1978); Vt. Stat. Ann. tit. 13, §§ 5205, 5231(2) (1974); Va. Code § 19.2-163 (1980); Wash. Rev. Code Ann. § 36.26.090 (1980); Wyo. Stat. §§ 7-1-110(a)(ii), -115(b) (1977).

States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974) (reversing conviction where indigent defendant was not provided with a psychiatrist's assistance in preparing and proving his defense). Where the development of expert evidence by a psychiatrist respecting a defendant's sanity has been hampered because of indigency, courts in federal cases have not hesitated to vacate the conviction and remand for a new trial with evidence received as to a psychiatric examination and an opinion of the accused's mental condition at the time of the offense. E.g., id., supra; United States v. Fessul, 531 F.2d 1275 (5th Cir. 1976); United States v. Taylor, 437 F.2d 371 (4th Cir. 1971); Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966).

[W]hen an insanity defense is appropriate, the indigent defendant is entitled to psychiatric assistance necessary to both the preparation and presentation of an adequate defense.

United States v. Lincoln, 542 F.2d 746, 750 (8th Cir. 1976), cert. denied, 429 U.S. 1006 (1977).

B. There Was A Breakdown In The Adversary Process In This Case Because Petitioner Was Foreclosed By His Indigency From Obtaining Expert Psychiatric Assistance In Preparing And Proving His Insanity Defense.

"One of the assumptions of the adversary system is that defendant's attorney will have at his disposal the essential means and elements to conduct an effective defense." Report of the Attorney General's Comm'n on Poverty and the Administration of Federal Criminal Justice 45-46 (1963) (hereinafter "Attorney General Report"). Accordingly, "[I]t follows that in so far as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversarial system." Id. at 11. See also, 1964 U.S. Code Cong. & Ad. News 2996 (setting forth rationale for the Federal Criminal Justice Act).

Petitioner's conviction is tainted because it was not the result of a vigorous adversarial contest.

Petitioner had no opportunity to establish his insanity defense through expert psychiatric testimony and indeed he had no psychiatric examination relevant to his mental state at the time of the offense.

The Oklahoma trial court was indifferent to petitioner's inability to establish his insanity defense, stating it had no statutory authority to appoint a psychiatrist and that Oklahoma's avowed policy was to deny indigent criminal defendants that right. Stidham v. State, 507 P.2d 1312 (Okla. Cr. App. 1973); Tims v. State, 525 P.2d 1227 (Okla. Cr. App. 1974). Here, the prejudice to petitioner was compounded by the prosecution's repeated questioning designed to establish that the psychiatrists had no opinion as to petitioner's sanity at the time of the offense (see p. 7 supra). Yet, Oklahoma's policy precluded that very proof.

Denied state-funded assistance, petitioner, although on trial for his life, still could not surmount the obstacle of his indigency and offer evidence in support of his substantial insanity defense. Petitioner's case clearly illustrates that "a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity." Attorney General Report at 11.

Oklahoma contends that it has no constitutional duty to provide this indigent petitioner the opportunity for psychiatric evaluation of his mental condition, relying on this Court's decision in Smith v. Baldi, 344 U.S. 561 (1953). In Baldi, this Court held that where the Pennsylvania court had already appointed one psychiatrist to examine the accused as to his sanity at the time of the offense and where that psychiatrist gave testimony, there was no constitutional mandate for Pennsylvania to appoint a second psychiatrist after petitioner pleaded guilty, to provide information as to the appropriate sentence. Id. at

568. Those facts clearly distinguish Baldi from this case in which Oklahoma gave petitioner no opportunity whatsoever for psychiatric examination regarding his mental state at the time of the offense.

II. Denial of Petitioner's Request for Expert Psychiatric Assistance Violated his Right to Individualized Sentencing.

There is no need to elaborate on this Court's insistence that there be individualized sentencing by the jury in capital cases during the second stage of the bifurcated trial, the sentencing stage. E.g., Gregg v. Georgia, 428 U.S. 153, 206 (1976); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (1983); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-06 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977).

"Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence are unavailable." Westbrook v. Zant, 704 F.2d 1487, 1496 (11th Cir. 1983). Where a defendant raises an insanity defense but is found guilty, a jury, at the penalty stage, may consider the psychiatric evidence presented in the first state of the trial as a mitigating factor. Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977), aff'd, 602 F.2d 694 (5th Cir. 1979), aff'd, 451 U.S. 454 (1981). Here, when petitioner was precluded from developing evidence in support of his defense of insanity, he was also precluded from developing such evidence for use in mitigation of punishment at the sentencing stage. Furthermore, petitioner was denied his right to individualized sentencing and to effective assistance of counsel at that stage when he was refused an expert's assistance in developing mitigating evidence independent of his insanity defense.

Wholly apart from those grounds, petitioner was entitled to expert psychiatric assistance to rebut the aggravating offense of his predicted future violence which the prosecution established by the use of psychiatric testimony. See Barefoot v. Estelle, 51 U.S.L.W. 5189 (U.S. 1983) ("jurors should not be barred from hearing the views of state psychiatrists along with the opposing views of defendant's doctors").

Justice Frankfurter thirty years ago stressed the value of psychiatric evidence in the sentencing phase of capital cases. Smith v. Baldi, 344 U.S. 561, 573 (Frankfurter, J., dissenting) (imposition of death sentence without hearing on sanity constitutes gross denial of due process).

III. The Prejudice to Petitioner Resulting from his Appearance Throughout his Trial While forcibly drugged with the sedative Thorazine is Constitutionally Offensive.

Petitioner's counsel protested that petitioner, heavily and forcibly sedated by Thorazine which was administered three times per day in doses of 200 mgms., was unfairly placed in a zombie-like trance, which demeanor prejudiced him before the jury assessing his guilt. The Thorazine rendered petitioner unable to assist his counsel. Indeed the Oklahoma Court of Criminal Appeals itself described petitioner's "abnormal" behavior during trial, but speculated that he was acting in support of his insanity defense. (See pp. 10-11, supra.)

Petitioner contends that the forcible administration of Thorazine to petitioner, which affected his mental and physical ability at the trial, for the purpose of rendering him competent to stand trial, violated his rights to effective assistance of counsel, impaired his ability and right to confront witnesses, denied him the right to

individualized sentencing, and transgressed equal protection and due process. There was no evidence in June 1980 that petitioner could not control his behavior.

Where, as here, the petitioner's mental competence is in issue, his right to offer testimony involves far more than verbalization if he takes the stand. The demeanor in court of one who has raised the issue of his sanity is itself of probative value to the fact finder. State v. Maryott, 492 P.2d 239 (Wash. App. 1971) (reversing conviction where defendant contrary to his consent was administered tranquilizers during trial where his sanity was at issue); United States v. Chandler, 72 F. Supp. 230 (D. Mass. 1947).

In State v. Murphy, 56 Wash, 2d 761, 355 P.2d 323 (1960), a defendant who was on trial for his life was granted a new trial because he had been tried in a drugged condition forcibly administered by the State. The Murphy court well recognized that the demeanor of defendant could influence the jury in assessing whether to impose the death penalty:

the matter of life or death of the accused may well depend upon the attitude, demeanor and appearance he presents to the members of the jury. [This requires] careful judicial scrutiny of every aspect of the trial afforded to the accused to the end that a new trial be granted in the event of a showing by the accused of a reasonable possibility that his attitude, appearance and demeanor, as observed by the jury, have been substantially influenced or affected by circumstances over which he had no real control.

Id. Petitioner's appearance before the jury while drugged denied him a fair chance for the jury favorably to "assess [his] demeanor and character." Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1972). In a capital case in particular, this amounts to prejudice sufficient to reverse both the conviction and punishment. See Propriety of Criminal Trial of One Under Influence of Drugs or Intoxicants at time of Trial, 83 A.L.R.2d 1067.

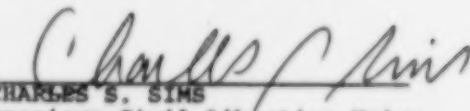
Accordingly, petitioner must be granted a new trial and be permitted to attend unseated absent contemporaneous and strong evidence by the state that petitioner would be unable to conduct himself properly in the courtroom. No such demonstration was made in June 1980.

CONCLUSION

For the foregoing reasons, the petition for Writ
of Certiorari should be granted.

Dated: September 7, 1983

Respectfully submitted,


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INDEX TO APPENDIX

<u>Item</u>	<u>Page</u>
Opinion of the Court of Criminal Appeals of Oklahoma, State v. Ake, 663 P.2d 1 (Okla. Cr. 1983)	A.1
Order Extending Time to File Petition for Writ of Certiorari	A.19
Order Denying Petition for Rehearing	A.18
O.S. 21 § 701.7	A.13
O.S. 21 § 701.9	A.13
O.S. 21 § 701.10	A.14
O.S. 21 § 701.11	A.14
O.S. 21 § 701.12	A.15
O.S. 21 § 701.13	A.15
O.S. 22 (1971) § 1171	A.16
O.S. 22 § 1175.2	A.17
Transcript April 10, 1980 [Excerpts from Petitioner's Sanity Hearing] . .	A.21
Letter of May 22, 1980 from Dr. R.D. Garcia to the Oklahoma Court	A.20
Transcript June 13, 1980 [excerpts, request for appointment of psychiatrist]	A.25
Transcript of Trial June 24, 1980 [excerpts from trial testimony]	A.33

EDITOR'S NOTE

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WILL BE ISSUED.

IN THE DISTRICT COURT IN AND FOR CANADIAN COUNTY,

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Plaintiff,

vs.

GLEN BURTON AKE, a/k/a

JOHNNY VANDENOVER,

Defendant.

PMH No. 80-8

CRP-79-302

CRP-79-303

CRP-79-304

CRP-79-305

IN RE: THE MENTAL HEALTH OF

GLEN BURTON AKE, a/k/a JOHNNY VANDENOVER

APRIL 10, 1980

BEFORE THE HONORABLE JUDGE FLOYD MARTIN

APPEARANCES:

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National Bank Tower, 204 N. Robinson Avenue, Oklahoma
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MR. BILL JAMES, Assistant District Attorney in and for
Canadian County, State of Oklahoma, Attorney for the
State of Oklahoma;

MR. DICK LEWIS, MR. JIM BREWER, MR. RICHARD STRUBHAR,
Attorneys for the Defendant.

REPORTED BY:

PATRICIA GENTRY, C.S.R.
Official Court Reporter
Canadian County,
State of Oklahoma

CLYDE GENE HILLER
COURT CLERK

1980 JUN 23 /11 9 57

FILED

1 that this morning?

2 A No.

3 Q Doctor, based upon your total contact with Mr.
4 Ake, based upon all of your examination of the records
5 available to you, and based upon your discussion with Dr.
6 Garcia, do you have an opinion as to Mr. Ake's present
7 mental competency?

8 A Yes.

9 Q Would you please tell me what your opinion is?

10 A I believe that he is a psychotic -- uh -- that
11 his psychiatric diagnosis was that of paranoid schizophrenia--
12 chronic, with exacerbation, that is with current upset,
13 and that in addition to the psychiatric diagnosis that he
14 is dangerous.

15 Q All right, sir. Are you familiar with the pro-
16 visions of the Mental Health Act of 1953 as amended, that
17 being the law of mental health in Oklahoma?

18 A Yes, sir, I am.

19 Q Do you have an opinion as to whether or not, within
20 the definition of that mental health law, Mr. Ake is a mental-
21 ly ill person?

22 A Yes.

23 Q I'm not certain that all of us might be as familiar
24 with medical terminology and I wanted to see whether we
25 could translate what you had previously said...

1 professional address, please?

2 A Jack Enos, M.D., 331 Main, Yukon, Oklahoma. I've
3 been in the family practice of medicine for twenty-nine years,
4 the last ten years perhaps with some added interest in psy-
5 chiatry.

6 Q Very well. Dr. Enos, I don't want to belabor this
7 hearing longer than necessary. I have taken both of you
8 doctors from your practice, and I appreciate your attendance
9 here today; I really do.

10 A Thank you.

11 Q Doctor, you have been present and have heard all
12 of the evidence by Dr. Allan, have you not?

13 A I have.

14 Q Can you tell me, please, sir, whether your im-
15 pressions or diagnosis would be, in any way different, than
16 those Dr. Allan suggested?

17 A I thought he stated the situation admirably and
18 I would concur in practically all of the findings. The only
19 question, as to whether I have an opinion on right and wrong ..

20 Q Yes?

21 A (Continuing)... I might say I do not have that firm
22 an opinion on this short an examination.

23 Q All right. Is there any other area of what Dr.
24 Allan said that you would care to elaborate on or that you
25 would care to distinguish your opinion from his?

1 A I believe not. I find it an essential agreement.

2 Q All right. I would like to ask you specifically,
3 rather than just adopting his view, to state your impression
4 of what is the least restrictive appropriate treatment at
5 this time for Mr. Ake?

6 A Certainly as humane as possible, and yet, to make
7 as sure as possible that this man is not free to suddenly
8 burst upon society or suddenly change his environment, but
9 well within the limits of what one can do either with drugs
10 or whatever, a psychiatric facility most appropriate to pro-
11 tect him.

12 Q All right. I am trying to listen carefully and
13 understand what you are saying. Do I understand you are
14 saying to me that your suggestion is that he be...

15 A Mm hm.

16 Q (Continuing)...treated as an inpatient within a
17 hospital confine rather than on an outpatient basis?

18 A Absolutely.

19 Q That -- what is your impression about the degree
20 of security needed at this time?

21 A I think it should be maximum at this time.

22 Q All right. Dr. Allan suggested that his diagnosis
23 was at this time his personality traits and his mental ill-
24 ness, if you please, makes him dangerous to society. Do you
25 concur with that?

1 IN THE DISTRICT COURT IN AND FOR CANADIAN COUNTY,

2 STATE OF OKLAHOMA

3 MAY 20 1980

4 THE STATE OF OKLAHOMA,

5 Plaintiff-in-Error,

6 v.

7 GLEN BURTON AKE, a/k/a
8 JOHNNY VANDENOVER, and
9 STEVEN KEITH HATCH, a/k/a
10 COTTON LICENSEES,

11 Defendants-in-Error.)

Case Nos. CRF-79-302;

CRF-79-303;

CRF-79-304;

CRF-79-305.

12 PRE-TRIAL CONFERENCE

13 JUNE 13, 1980

14 BEFORE THE HONORABLE FLOYD L. MARTIN

15 *****

16 APPEARANCES:

17 MR. EARL E. CORPKE, District Attorney within and for
18 Canadian County, State of Oklahoma, and

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21 Attorneys for the Plaintiff-in-Error.

22 MR. RICHARD D. STRUBHAR, Attorney at Law, 403 West Vandamer
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Attorneys for the Defendant, "Mr. Ake."

MR. MARK LEO "BOB" CANTRELL, Attorney at Law, 114 South
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Attorney for the Defendant, "Mr. Hatch"

REPORTED BY:

Patricia Gentry, C.S.R.
Official Court Reporter

1 defense furnish you a copy of a private report, but I am
2 curious about something else that you haven't mentioned. If
3 you intend to have a psychiatrist evaluate your client and you
4 are court-appointed counsel...

5 MR. BREWER: That comes next, judge.

6 THE COURT: (Continued)...how--all right. How do
7 you intend to pay for it?

8 MR. BREWER: That was phase two.

9 THE COURT: All right.

10 MR. BREWER: At this time, judge, in relationship to our
11 motion, now--I'm sure the court is very well aware of the
12 severity of the charge--the court appointed, and by statute,
13 we are granted certain funds by law that if the court sees
14 necessary or fit and proper, the court can award us money to
15 prepare a proper defense. And, at this time I am going to ask
16 the court to grant us a reasonable amount of funds in which
17 to pay the psychiatrist with; due to the fact, one, that the
18 court has already seen fit to incarcerate, or to send him for
19 a mental evaluation, giving right to the court that there was
20 a problem. And, at this point, defense counsel feels that
21 Glen Ake, indigent, and the court appointed counsel; still,
22 under the constitution is entitled to monies for a psychiatrist
23 as if he were another Cullin Davis who had the money to pay
24 for it. To deny...

25 THE COURT: Show me any statutory or case authority

1 that the court even has the power to pay for it, much less any
2 right, under...

3 MR. BREWER: Okay, sir. Under Title -- excuse me, judge,
4 I have got a lot of material here, ...

5 (The court complied.)

6 MR. JAMES: Your Honor, while everybody's kind of looking
7 here, I'm familiar--of course I didn't know the motion was
8 going to be here today--but I am familiar with some recent case
9 law that says that they are not entitled to have additional
10 doctors appointed, and, in truth, you have appointed a doctor
11 to examine him. You appointed the doctor at Vinita to examine
12 him. He is a professional person. He treated him as an
13 independant source.

14 THE COURT: Yes. Well, Mr. Brewer argued that there
15 was statutory provision for that, and I was not aware of it.
16 I thought perhaps I could learn something.

17 MR. BREWER: Under Title 21...

18 THE COURT: Under 21?

19 MR. BREWER: (Continued)...O.S. Supplement, 1978, 701.14...

20 THE COURT: 701.14.

21 MR. BREWER: (Continued)...which goes to the appointment
22 of counsel and compensation; if my memory serves me right,
23 there is a paragraph in there or words that I can be afforded
24 an attorney's fee and a reasonable amount for expenses.

25 (WHEREUPON, a discussion ensued off the record.)

1 MR. BREWER: Judge, may I make one other statement at
2 this point?

3 THE COURT: Go ahead.

4 MR. BREWER: It may solve a lot of problems. Mr. Strubhar
5 and I are both in agreement that the court appointed a very
6 qualified M.D., Dr. William L. Allen and the court--at the
7 time when Dr. Allen was one of the doctors that declared him
8 to be incompetent--the court could then instruct Dr. Allen
9 to go back and review Glen Ake at this time. That would be
10 sufficient for us.

11 (WHEREUPON, a discussion ensued off the record.)

12 THE COURT: Let me hand you the statute book that I
13 have received from my library now and see if you can find what
14 you had in mind.

15 MR. BREWER: I figured that--if the court please, I
16 remember seeing it, judge--if the court please, I will have to,
17 during this very short period of time--I told the court I will
18 furnish the court with that, but it says that, if I remember
19 correctly, the courts said where a man is declared indigent
20 and is appointed legal counsel, at that point in time, if the
21 court please, is prima facie--the man does not have any money
22 because he was appointed legal counsel. Thus, in order to
23 properly give him the defense necessary, then when the court
24 appointed legal counsel, the thing that stems from that would
25 be a meager amount of funds to prepare for the case, other than

1 just a meager attorneys' fee. The State has an unlimited
2 budget and things of this nature.

3 THE COURT: Oh, my, thank you. Go ahead.

4 (The parties laughed.)

5 THE COURT: Exclamation point.

6 THE REPORTER: I got that.

7 MR. BREWER: In Florida numerous employees, plus very
8 good friends of the Police Department and other agents that
9 get things done that does not cost money for defendants, indi-
10 gent defendants in jeopardy of losing their life, come before
11 our judicial system. The court appoints a legal counsel and
12 then, having declared him indigent, then the court, by their
13 own declaring of indigency and appointing of legal counsel,
14 has inferred meager funds for preparation because the judge
15 couldn't possibly conceive that defense attorneys could just
16 be appointed and coldly walk into a case and defend a Murder
17 One without some kind of meager money or meager means and
18 investigating monies.

19 To deny to this client the indigent, individual,
20 funds for the preparations would be a miscarriage of justice,
21 to even appoint even an attorney, if the court please, because
22 an attorney has got to have, as the court knows, funds to
23 properly defend his client. And, in a Murder One case, I
24 hear the word "expense", and I cannot possibly believe that
25 in anybody's heart a few meager dollars is going to stand between

1 a man charged with Murder in the First Degree, of insuring
2 him of a constitutional, fair and impartial trial, and being
3 prepared because of a few dollars that they think might be
4 spent of the taxpayers' money. Life, itself, is far too
5 precious to consider any monetary value that might be expended
6 within reason, and that is where the underlying factor of
7 expenses come when they appoint an attorney. It is automatic-
8 ly assumed that you will get some money...

9 THE COURT: Mr. Brewer, let me interrupt your state-
10 ment a moment.

11 MR. BREWER: (Continued)...I have no more to say, judge.
12 I will write you a little brief or something.

13 THE COURT: Do we agree that the statute you cited,
14 at least by number, does not appear to grant that authority,
15 as I read it?

16 MR. BREWER: Yes, sir, I will agree with that.

17 THE COURT: All right.

18 MR. BREWER: But, I will just inform the court that it is
19 in my mind... I read the statute and operated under it five
20 times. There is someplace where I am entitled to expenses
21 because I remember getting expenses in a case for...

22 THE COURT: All right.

23 MR. BREWER: (Continued)...\$16.50 for xerox copies I
24 made and Judge Homer Smith signed the order and I haven't
25 cited it to you, but I will find that case or whatever he used

1 Remand for Present Competency. What did you mean, and what is
2 your position?

3 MR. BREWER: If the court please, at this time, I believe
4 that we are entitled to a jury trial to determine the present
5 mental competency of Glen Ake due to the fact that he has been
6 declared incompetent to stand trial. That motion is being pre-
7 pared, and if the court please, I was in a position to tell the
8 court that we are preparing some legal argument on that posi-
9 tion but we don't have it here at this point in time to where
10 we are entitled--but a question of a person's sanity has been
11 raised in issue--we are entitled to a jury trial to determine
12 his mental competency at this time.

13 THE COURT: Well, you used the expression, "remand." As
14 I understand, all you are asking for is a separate jury trial...

15 MR. BREWER: Correct.

16 THE COURT: (Continued)...to determine the present
17 sanity? Is that your position?

18 MR. BREWER: Yes, sir.

19 THE COURT: The State?

20 MR. JAMES: Your Honor, as we previously stated, we are
21 just not prepared to argue at this time because we haven't
22 seen the motion.

23 THE COURT: All right. If it should be determined
24 that that is required, it could be done immediately preceding
25 the trial. I don't see any reason that I have to rule on that

and bring it back to the court for your evaluation.

THE COURT: Let me state, before ruling upon your motion, I am not aware of any statutory authority in this case. I am aware of U.S. Supreme Court case in U.S. Ex Rel. Smith v. Baldy: 334 U.S. 561, 97 Law Ed. 549; 73 Sup. Ct. 391, in which the U.S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants. Oklahoma has cited that U.S. Supreme Court case in two decisions, of which I am aware. In Stedham v. State at 507 P 2d. 81310, and Time v. State at 525 P 2d. 81227, in both Stedham and Time, our Court of Criminal Appeals denied that right to defense counsel.

The further problem in regard to it is that the statutes and all of the rulings are, originally, very strict, and since then have become almost crippling restrictive, that courts may not-- repeat, "not"--spend any court funds unless specifically authorized by statute. This has been more and more strictly construed against courts, and so unless I can see some specific authority, I could not even consider it. The request for private psychiatric evaluation at the expense of the State is denied. You may have the defendant available, if you are able to arrange it, in some other manner.

Now, what is your position, Mr. Brewer, with regard to the motion not yet filed, but which you reminded the court you would like to file? I believe you called it a Motion to

IN THE DISTRICT COURT IN AND FOR CANADIAN COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Plaintiff-in-Error,

vs.

GLEN BURTON AKE, a/k/a JOHNNY
VANDENOVER, and STEVEN KEITH
HATCH, a/k/a STEVE LIENBEE,

Defendants-in-Error.

No's. CRF-79-302
CRF-79-303
CRF-79-304
CRF-79-305

TRANSCRIPT OF PROCEEDINGS ON APPEAL
HAD FROM JUNE 23 THROUGH JUNE 26, 1980
BEFORE THE HONORABLE JAMES D. BEDNAR

APPEARANCES:

MR. EARL GOERKE, District Attorney; and MR. BILL JAMES,
Assistant District Attorney, appearing on behalf of the
State of Oklahoma.

MR. J. MALONE BREWER, Attorney at Law, Suite 214, 2000
Classen Boulevard, Oklahoma City, Oklahoma 73106, appearing
on behalf of the Defendant Glen Burton Ake.

MR. RICHARD D. STRUBHAR, Attorney at Law, 403 West Vandament,
Yukon, Oklahoma 73099, appearing on behalf of the Defendant
Glen Burton Ake.

REPORTED BY:

Mark W. Mishoe, C.S.R.
Official Court Reporter
Canadian County Courthouse
El Reno, Oklahoma 73036

FILED Oct. 24 1980
Sharon Hill

1 A Yeah, I spelled out, I think, very specifically. In 564
2 the first time was "Did he have a mental illness?", and two,
3 "Did he understand the charges against him?", and "Could he
4 cooperate with counsel?" And, then on the second time, "Did
5 he have a mental illness?", and "Was he dangerous?" And, in
6 neither case did I specifically go into detail, try to get
7 answers as to his ability to know right from wrong at the time
8 of the alleged act.

9 Q So, that was not your concern, is that correct?

10 A That's right.

11 Q But, you did associate his condition, based upon
12 what he appeared during those two. How long was your observation
13 then, in April -- how long a period?

14 A I don't know, it was about -- I know it was in the
15 court. You were there.

16 Q Yes, sir.

17 A I think it was about an hour. It was very difficult
18 to interview him, particularly in that setting.

19 Q No psychological tests were administered, were they?

20 A No.

21 Q No physiological tests were administered, were they?

22 A No, I did have the benefit of Dr. Garcia's report of
23 the psychological tests done at Eastern State. But, I think
24 the psychologist there could speak to that more directly.

25 Q Is the mental illness that he has functional, or organic?

1 A The usual way of thinking, is that it is functional. 565

2 Q And, I assume it is one that's found in DSM, Second
3 Addition?

4 A And, now third.

5 Q Third Addition. Is that the one you used to categorize,
6 or use DSM-1, DSM-2, or DSM-3?

7 A Three. In this particular case, there is no significant
8 difference.

9 Q Right, I understand. But, there is a significant
10 difference in certain little areas, because mental illness is
11 actually a result of the voting of the body annually, or some-
12 thing of that nature, isn't it -- to determine what categories
13 and symptoms form it?

14 A No -- you mean, how--

15 Q For those in the DSM?

16 A One of the standard diagnoses in psychiatry. There is
17 a standard diagnostic manual, and the first one came out in
18 '52, and the second one somewhere in the '68--

19 Q '68, yes, sir.

20 A --and, the current one has just come out.

21 Q Also, classified in DSM-1, 2, and 3 would be mental
22 illnesses, would be -- place one in a category who maybe worries
23 about his job, or worries about his marriage, does it not?

24 A Absolutely.

25 Q The principal thing that I would like to know -- we

1 are talking about two different things, mental illness as
2 opposed to the legal term of "insanity", is that correct?

3 A (Witness nods head affirmatively.)

4 Q One further question. And, do I understand from your
5 testimony, sir -- or, let me ask you, as a result of your
6 findings in April 1980, you are not attempting to determine
7 whether the defendant was mentally sane -- the legal term, in
8 October, or November of 1979, are you, sir?

9 A That's right.

10 MR. GOERKE: No further questions.

11 THE COURT: Mr. Brewer?

12 REDIRECT EXAMINATION

13 QUESTIONS BY MR. BREWER:

14 Q Doctor, with -- in light of your interviews and
15 consultation with Mr. Ake, did you state that the possibility
16 of this illness that he has been suffering from could possibly
17 date back to age 7?

18 A Yes, sir.

19 Q Is that a possibility?

20 A That's a possibility.

21 Q So, if that possibility -- hypothetically, was correct,
22 then on the days in question, this illness could also still be
23 apparent then too, is that not correct?

24 A That's another possibility.

25 Q Now, doctor, on February the 22nd -- before I ask that

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1 (Court is recessed.)

57:

2 (Court is called to order with the Court, counsel,
3 defendant, jury, and all parties present as heretofore.)

4 THE COURT: All right. Will the defense call their
5 next witness, please?

6 MR. BREWER: Yes, sir, the defense will call Dr. Enos.

7 THE COURT: If you will approach the bench and raise
8 your right hand, please.

9 (Witness is sworn.)

10 DR. JACK P. ENOS,

11 called as a witness for the defendant, having been first duly
12 sworn, testified as follows, to-wit:

13 DIRECT EXAMINATION

14 QUESTIONS BY MR. BREWER:

15 Q State your name for the Court and jury, please?

16 A Jack P. Enos, M.D.

17 Q Now, doctor, what is your profession?

18 A General Practice of Medicine.

19 Q All right. Now, doctor, do you do any work in psychiatry

20 A Some. I have some interest in it.

21 Q Would you relate to us your background in medicine
22 and psychiatry for us, please?

23 A I practiced in Yukon for 29 years. The last ten years
24 I have been taking an ongoing course in psychiatry for general
25 medicine.

1 Q Have you ever served on any sanity board, or anything 57.
2 for the county, and things of this nature?

3 A Yes, sir.

4 Q Doctor, call your attention to April 10th, 1980, did
5 you have an opportunity to come in contact with an individual
6 by the name of Glen Burton Ake?

7 A Yes, I did.

8 Q And, what was the relationship of that contact, please?

9 A The sanity commission had been impanelled, two doctors
10 and a lawyer. I happened to be one of the two doctors.

11 Q Now, doctor, at that time at the sanity hearing, did
12 you have an opportunity to view and talk with Glen Ake?

13 A I had an opportunity, yes.

14 Q And, tell us something about that conversation, and
15 things that occurred at the sanity hearing, please, sir?

16 A Well, it was essentially onesided, very little input
17 on the part of Mr. Ake. Some that he did not feel inclined,
18 or necessary to talk to us, since he talked on a different
19 plane than we talked on.

20 Q Did he mention talking to God, and things of this
21 nature?

22 A Briefly, that was the only person whom he really
23 communicated.

24 Q Did you have an opportunity to review any medical
25 documents, any reports prior to this hearing?

1 A Yes, we had Dr. Garcia's report, and we had Dr.
2 Allan's report from a previous examination in the jail here.

3 Q Now, combined with your own interview with the
4 defendant Glen Ake, and review of these medical reports, at the
5 sanity hearing did you come up with a medical opinion as to
6 the competency, or the mental state of Glen Ake?

7 A Yes, uh-huh, we felt and so stated that he was mentally
8 ill.

9 Q Mentally ill?

10 A Right.

11 Q Okay, sir. Now, have you reviewed any reports from
12 Dr. Garcia regarding Glen Ake, and medication that -- known as
13 Thorazine?

14 A I have.

15 Q Now, doctor, you are aware that Glen Ake is taking
16 200 milligrams of medication, three times a day -- Thorazine?

17 A That's what the report says.

18 Q What is Thorazine, and how -- what does it do to you?

19 A It is a major tranquilizer used usually in people who
20 are psychotic, as opposed to neurotic.

21 Q Okay. How would a person react -- how would -- take
22 me for example, which is a poor example, but take me with 200
23 milligrams of Thorazine -- if you gave it to me right now, what
24 would occur?

25 MR. GOERKE: If it please the Court, I don't believe

1 this is really the proper form of a hypothetical question, if 575
2 that's what he is attempting to ask.
3 MR. BREWER: I'll rearrange it.
4 Q (By Mr. Brewer:) Take a considered normal individual,
5 give him 200 milligrams of Thorazine, and what are the reactions
6 going to be?
7 A Most people will become extremely drowsy.
8 Q And, what about 200 milligrams, three times a day,
9 what would that do to him?
10 A I think they become three times as drowsy.
11 Q Would it put them asleep, or put them to a point that
12 they are--
13 A This is my opinion of the average person.
14 Q Do you have any medical opinion of the mental condition
15 of Glen Ake?
16 A Yes, I do.
17 Q Would you classify Glen Ake at this time, to the
18 best of your knowledge and medical belief?
19 A To the best of my knowledge and belief, I think this
20 man is paranoid schizophrenic.
21 Q You consider him to be mentally ill?
22 A I certainly do.
23 MR. BREWER: No further questions.
24 THE COURT: Mr. Goerke, cross examination?
25

1 CROSS EXAMINATION 576
2 QUESTIONS BY MR. GOERKE:
3 Q Dr. Enos, that was your opinion on April 10th, 1980?
4 A It was.
5 Q And, it is your opinion today?
6 A Yes, sir.
7 Q All right, sir. If I might ask, how long did you
8 observe him on April 10th?
9 A Well, I would estimate the whole hearing consumed
10 not more than thirty minutes.
11 Q How many times have you consulted him prior to that,
12 or observed him?
13 A Never.
14 Q How many times since then?
15 A Never.
16 Q You reached your opinion though -- and, what is the
17 mental disorder, the exact mental disorder that you pinpointed
18 that is recognized by DSM?
19 A The one I gave, I think would come nearest fitting
20 the category, schizophrenia, chronic paranoid type.
21 Q This is the same book that says "mental illness" is
22 worrying about your job, or worrying about your marriage?
23 A Right. It starts out that way.
24 Q What were the pivotal facts giving rise to that
25 diagnosis on April 10th?

1 A Mainly the reports available to me by a trained 57
2 psychiatrist, as well as--
3 Q Actually, you say "reports". Those were just letters,
4 were they not? Were they Dr. Allan's--
5 A I wouldn't argue this, right. Written publications,
6 written documents.
7 Q Right, a letter recommending that he be committed
8 for observation, that he couldn't reach any conclusions. Wasn't
9 that Dr. Allan's "report"?
10 A Probably. I wouldn't argue the point. He certainly
11 said that he couldn't make some statements.
12 Q Right. Did you have the advantage of some psychological
13 tests? Let me ask you, did you have the advantage of an MMPI?
14 A I did not.
15 Q Did you have the advantage of a House/Tree/Person
16 test?
17 A No.
18 Q Thematic Apperception Test?
19 A No, sir. I am familiar with all of these, but none--
20 Q Porteus Maze Test?
21 A No.
22 Q Bender-Gestalt Test?
23 A No.
24 Q Wechsler Adult Intelligence Test?
25 A No.

1 Q Graham-Kandall Test? 576
2 A No.
3 Q Shipley-Hartford Test?
4 MR. BREWER: We will object, Judge. He has already
5 testified he didn't give him any tests, if the Court please.
6 THE COURT: Yeah, I'll -- I think -- was your testimony
7 you gave no tests?
8 THE WITNESS: Correct.
9 Q (By Mr. Goerke:) No psychological tests?
10 A No, no psychological tests.
11 Q Did you give any -- let me ask you, was your diagnosis
12 functional or organic?
13 A I really couldn't state that with a certainty.
14 Q Well, those are the two--
15 A Yeah, I really think it is organic, and I probably
16 should elaborate.
17 Q All right, sir.
18 A That the medicine--
19 Q Let me ask you, did you have a benefit of any
20 physiological tests, such as an x-ray, or electroencephalogram,
21 pneumoencephalogram?
22 A No.
23 Q Neurological exam?
24 A Not unless they were included in Dr. Garcia's report.
25 I don't remember whether a neurological may or may not have

1 been included.
2 Q But, you didn't rely on that?
3 A No, I wasn't expected to show anything.
4 Q So, you didn't have the benefit of any psychological
5 tests, nor any physiological tests to reach your conclusion?
6 A I hate to say none.
7 Q Did you have the benefit of a clinical interview?
8 A We had the opportunity--
9 Q Did you conduct one?
10 A We had the opportunity.
11 Q Did you conduct a clinical--
12 A Did I ask him questions? Yes.
13 Q During that thirty minute observation period?
14 A Right.
15 Q Did you have any benefit of, or any awareness of any
16 previous mental or medical history?
17 A Had testimony from his mother, and others.
18 Q But, nothing documented?
19 A By word of mouth.
20 Q Did you consult with any of these former co-workers?
21 A No.
22 Q Friends?
23 A No.
24 Q Police officers?
25 A I don't believe any officers testified at the time.

575

A.44

1 A He is sick.
2 Q Is he mentally sick?
3 A Yes.
4 MR. BREWER: No further questions.
5 THE COURT: Anything further, gentlemen?

6 RE-CROSS EXAMINATION

7 QUESTIONS BY MR. GOERKE:

8 Q Doctor, you haven't seen him since April 10th, have
9 you?
10 A No, sir.
11 Q Do you really feel that you can formulate within a
12 certain degree of medical certainty, or psychiatric certainty
13 that opinion? Are you really qualified?
14 A I don't know if anybody is really qualified. I should
15 probably, might have to say he was sick on April the 10th.
16 Q All right, sir. And, what we are talking about still
17 is mental illness, would you agree?
18 A Right.
19 Q Is there any place, in any report you have ever seen,
20 or anything you have had the benefit to review, that has said
21 "this defendant was legally insane in October or November of
22 1979"?
23 A No, sir.
24 Q Do you have any opinion as to whether--
25 A No, sir.

584

A.45

1 THE COURT: All right. Thank you, Dr. Enos, you are 58:
2 excused, you are free to go.

3 THE WITNESS: Thank you.

4 THE COURT: All right. Call your next witness.

5 MR. BREWER: If the Court please, we will call Dr.
6 Garcia.

7 THE COURT: Dr. Garcia, if you will approach the
8 bench and raise your right hand.

9 (Witness is sworn.)

10 DR. R. D. GARCIA,

11 called as a witness for the Defendant, having been first duly
12 sworn, testified as follows, to-wit:

13 DIRECT EXAMINATION

14 QUESTIONS BY MR. BREWER:

15 Q How are you, doctor? Would you state your name for
16 the Court and jury, please?

17 A My name is R. D. Garcia, M.D.

18 Q Dr. Garcia, how are you employed?

19 A I'm employed at the Eastern State Hospital, at Vinita,
20 Oklahoma, as a psychiatrist.

21 Q All right. Now, that is a State Hospital, is that
22 not correct?

23 A Yes, sir.

24 Q All right. Now, for the ladies and gentlemen of the
25 jury and for the record, would you please relate to us your

A.46

1 we sent him back to the court declaring him competent to face 592
2 trial, and that took place when he left Eastern State Hospital
3 on June 9th, of this year.

4 Q All right. Now, doctor, medically speaking, would
5 you still classify Glen Ake as mentally ill?

6 A He still would be classified mentally ill, but in
7 remission. In other words, in terms of the symptoms with
8 medication as a follow-up. What I mean to say, if we tried to
9 discontinue his current medication that he is taking now, he
10 might become overtly ill again.

11 Q All right. Now, you will have to -- I'm in kind of
12 an awkward position, you might kind of guide me a little bit.
13 An individual who is paranoid psychotic -- okay? That is taking
14 hallucinogenic drugs, consuming a large quantity of alcohol --
15 okay? Given the combination, would the reaction that you say
16 in your evaluation of Glen Barton Ake, at that point in time,
17 and under those conditions, would an individual be able to
18 distinguish right from wrong?

19 A If that's true, I would consider him unable to do so.

20 Q Unable to know, or to--

21 A The basic difference between right or wrong -- the
22 legal way.

23 Q He wouldn't know--

24 A But, not necessarily considering him legally insane,
25 in a way like knowing right from wrong, because a mentally ill

A.47

1 individual, they still know some basic difference between right 593
2 and wrong.

3 Q But, under that situation then, through the consumption
4 of alcohol, hallucinogenic drugs, and paranoid schizophrenia,
5 there is a possibility that it would render a person unable to
6 distinguish right from wrong, as I saying that correctly?

7 A That's correct, sir.

8 Q All right, sir.

9 A Absolutely.

10 Q So, given a hypothetical situation, on a given date,
11 at a given time, a paranoid schizophrenic drinks a lot of alcohol,
12 and takes hallucinogenic drugs, he could then commit an act
13 that he does not know, or is not responsible for, is that not
14 correct, sir?

15 A It is a possibility.

16 Q All right. Now, doctor, so I can understand, the jury
17 can understand, what tests -- I don't have a list of all those
18 names. There is a whole bunch of tests you give people, you know,
19 when you do them. Did you give him a bunch of tests, and things
20 of this order?

21 A Quite a bit of testing with regard to his emotional
22 condition, family life, history of mental illness, treatment in
23 the past, tests whether he was basically just a plain antisocial,
24 or malingering individual -- hardly not. These tests were all
25 undertaken. In the IQ test, in the beginning he failed to score

1 Q Okay. Not legally insane as knowing right from
2 wrong, but just incompetent to aid in his defense, is that
3 correct?

4 A Yes, sir.

5 Q Was there any call at that time for a diagnosis as
6 to October or November 1979? Were you looking into that?

7 A No, sir. We were unable to assess him during that --
8 those months.

9 Q You made a determination that he was mentally in-
10 competent, or mentally ill, is that correct, in April?

11 A Yes, sir, in March and April.

12 Q And, then you received him back when, sir?

13 A April 10th, which was returned back for treatment.

14 Q And, you sent a letter saying that he was competent
15 to stand trial on what date, sir?

16 A That was -- I don't have the letter here with me, but --

17 Q Approximately May 22nd?

18 A May 22nd, yeah, that's correct.

19 Q So, you had him back for twenty days -- approximately --
20 I don't remember the days, how many days in the month, but
21 around twenty days in April, and then another twenty-two days.
22 So, anywhere from forty-two to forty-three days, is that correct?

23 A That's correct.

24 Q And, you found that -- by the time of writing the
25 letter somewhere, that he was competent to stand trial?

1 Q Did he possess the ability to do that even at that
2 time?

601

3 A He did not possess much ability to do the complete
4 testing at the time.

5 Q And, later tests after you stabilized him during this
6 time period, show that he had normal mentality, is that correct?

7 A Yes, sir.

8 Q I did not understand, but you talked about -- something
9 about, he never acted out, or would you explain what you mean?

10 A It is the same as malingering spell. Acting out is
11 behavior, or emotional thinking like a person is feigning, or
12 malingering, or faking.

13 Q And, you said something about -- now, truthful, all
14 I caught was violent and dangerous. That he is potentially
15 violent and dangerous if he comes off his medicine?

16 A Yes, sir, that's what we thought -- without medication
17 he may be potentially dangerous.

18 Q Be likely to act out again?

19 A And, likely to show his mental illness again.

20 Q Now, doctor, we have talked about "mental illness",
21 is really what all this conversation has been about, even with
22 Mr. Brewer and myself, is that correct?

23 A Yes, sir.

24 Q In '72 you started testifying -- you said in criminal
25 cases, is that correct?

1 A That's correct.

2 Q So, for the last eight years you have been the expert
3 from Vinita Hospital, is that correct?

4 A Yes, sir.

5 Q Now, today -- you know the phrase of "legal insanity"?
6 A Yes, sir.

7 Q Have you done any testing, or evaluation of Glen
8 Burton Ake as towards legal insanity at the time of the
9 commission of the offense?

10 A No, sir, we were not able to.

11 Q Do you have any opinion as to Glen Burton Ake's mental
12 insanity at the time of the offense -- October or November?

13 A No, I would not say. I have a personal opinion.

14 Q Do you have no opinion then that you can -- professional
15 opinion? You have done no testing?

16 A Professionally, no, sir.

17 Q When you were testing -- hypothetically, if you were
18 testing Glen Burton Ake in March, and April, and May, if he
19 would have been able to relate the incidents that's on trial
20 here -- and, you are aware of what the charges are, aren't you,
21 sir?

22 A Yes, sir.

23 Q Two murder counts, we are talking about basically.
24 Do you understand that? And, an incident where two children
25 were shot?

602

1 then Vinita for mental observation. And, what occurs? It 659
2 comes back and says he is incompetent. Not that he is insane,
3 but he is incompetent. They didn't address the question as to
4 what was his sanity at the time in question of the alleged
5 incident at this point.

6 So, what do we know at this point? That the man is mentally
7 sick, and he is mentally ill. Now, did that information come to
8 you from the highpowered doctors, paid by big defense lawyers
9 out of a big defense fund? Ruh-uh. It came to you by court
10 appointed doctors, asked by a Judge to go visit the defendant.
11 It came to you from a man who was appointed by the Court -- Dr.
12 Enos, to sit on a sanity board. And, then by Dr. Garcia who is
13 employed by the State of Oklahoma, who also represents the
14 people, and he told you about the problem.

15 Now, chapter six is entitled "The Zombie, a/k/a The Blue
16 Angel." Now, that may sound strange, but I'm going to show you
17 exactly where the situation that we are faced with. The Zombie,
18 right there -- Glen Burton Ake. We know one thing for sure right
19 now, ladies and gentlemen, that there is no question in your
20 mind -- there can't be, that as we sit here right today, Glen
21 Burton Ake is under 200 milligrams of a sedative, that the doctor
22 said if taken by normal human beings, it would knock them flat.
23 So, he is tranquilized. His Constitutional rights to a fair
24 trial, and the State has got him drugged.

25 Now, I didn't ask for those drugs. I don't even know what

1 that thing was. I couldn't even pronounce the -- couldn't even 660
2 pronounce what it was. But, we got into it and it is a tran-
3 quillizer, where the doctor said on me, or you, or -- I forget,
4 something about a normal human being, that it would really knock
5 them out -- three times a day. That's 600 milligrams, not 200.
6 And, here we are at a jury trial, the man is under 600 milligrams
7 of tranquilizer, in our system of justice.

8 One thing we know though, as I stand right here, right
9 now -- there is not a slight question about it, that man right
10 there -- Glen Burton Ake, is mentally ill. It came from that
11 witness stand, three doctors -- three psychiatrists -- and,
12 don't forget Dr. Garcia, he has a whole staff. We are not just
13 talking about Dr. Garcia himself. We are talking about -- what
14 did he say? There was some nurses that gave him some x-rays.
15 They checked him physically. They looked at him mentally. Even
16 Dr. Garcia say, "Hey, I thought this guy was playing. I gave
17 him all of these tests. We find out he is not." But, what do
18 we know right this minute? That all three doctors agreed on?
19 That man right there is mentally ill. He is mentally ill. That
20 is undisputed.

21 I don't know where we turn, ladies and gentlemen, in our
22 society. I don't know much about mental illness, but I know
23 that a man that is mentally ill is treated -- is treated, not
24 punished. His mental illness, they say, is under control by
25 use of this drug. Now, I don't really understand that either.

1 I kind of compare it to, I break my leg, you know, and it hurts 661
2 and then they give me something -- some morphine. Well, it
3 quits hurting, but I still got a broken leg. And, that's what
4 they said about this man. As long as he got this medicine, he
5 is going to be kind of all right. You observe him, what else
6 can he be? The Zombie. But, we know that at the time of this
7 crime he wasn't on this medicine, was he? Ruh-uh. We know that
8 he was a paranoid schizophrenic at that time, don't we? Yeah.
9 I mean, if we are going to believe psychiatrists. And, I don't
10 know about that either, but that's what they said. And, they
11 work for the State, and they make their living at it, and they
12 study it, and they study it, and they study it. All the articles,
13 and all of the books, and everything -- they know all about it,
14 and that's what they said.

15 Do you know, as you prepare in your defense, and everything
16 that you have got you have to pull from the State -- pull from
17 the State, we have to come in here and write the final chapter
18 in the State's book -- as they talked about, their five chapters.
19 We are required to write the fifth chapter -- or, the sixth
20 chapter.

21 Ladies and gentlemen, the issue is -- and, I think you can
22 clearly see this, as I try to put it together in my own mind,
23 that there is no question that Reverend Douglass was shot. There
24 is no question that Mrs. Douglass was shot and killed. There
25 is no question those kids were shot. You know, that's not an

1 issue, we know that. What is really at issue, and is trying 662
2 to be camouflaged, is trying to be put way back on that back
3 burner, saying "Hey, we don't really know.", is whether or not
4 this man right here, did in fact know what he was doing. For
5 God sakes, we don't take people who don't know what they are
6 doing and punish them. Or, if there is a question, we dwell on
7 it. The Court -- the Court has set it out probably better than
8 I could ever probably set it out, because this is the law, and
9 this is what you are supposed to follow. Now, let me just --
10 I'm not going to read these things to you. Let me just tell
11 you what I want you to look at, right here, it says right here
12 in the last page -- you will get these things with you, and it
13 will be on Number 12 -- it will be right down here at the very
14 bottom, I've got some marks on mine -- it says, "It is sufficient
15 if he only introduces sufficient evidence to raise in the minds
16 of the jury a reasonable doubt of his sanity at the time of the
17 act." Now, at the time of the act he wasn't caught. He wasn't
18 looked at by doctors. So, we go back in retrospect, which I
19 think is proper. We are talking about a very serious crime, and
20 we have to go back and look at it in retrospect. What was the
21 situation? We know what it is now. What was it then? You
22 know, we go back in history all the time. We try to reconstruct
23 things like the Roman Empire, and things. They go back in retro-
24 spect, and they are pretty accurate. You know, they do the same
25 thing on people. And, the same thing on situations like this.

1 Dr. Allan said that from his discussions with Mr. Ake, that 663
2 he discussed, and said that even as far back as the age of 7,
3 he was talking and discussing problems with the Lord, and God,
4 which gave rise to the first indication of his testimony of a
5 paranoid schizophrenic. Now, we know that it was -- or, we have
6 reason to believe that it started somewhere back in that
7 neighborhood -- maybe not severe. Dr. Garcia said a paranoid
8 schizophrenic that comes in contact with a foreign substance --
9 either alcohol, or drugs, or both, could reach a state, or a
10 point that he does not know the difference between right and
11 wrong. That's one point we have to look at -- that is in retro-
12 spect.

13 Now, what did the other doctor say? One, Dr. Allan said --
14 "does he know right from wrong?" And, he said, "yes." But, he
15 also followed that up by saying, "He did not accept the authority
16 that we have right now." Now, what did he mean? If you don't
17 accept the authority, and you are mentally ill, then the authority
18 you are operating by does not correlate to our authority. Thus,
19 you are not saying right from wrong on our level, but on some
20 other level. That's exactly what Dr. Allan said. He went on
21 to say that he felt like that he was an avenging angel of God.
22 I don't remember exactly what he said -- (demonstrating) that
23 God was here, and he sat here, and he was the avenging angel.
24 Ladies and gentlemen, that does not occur just over night. It
25 doesn't happen. That's an illness that is prolonged, and grows

1 inside of an individual. He didn't know he was a paranoid 664
2 schizophrenic. None of us know if we are paranoid schizophrenic.
3 But, coupled with -- but coupled with alcoholic drugs, Dr.
4 Garcia says that there is the possibility the man could not
5 distinguish right from wrong. The Court has said, "It is
6 sufficient if he only introduces sufficient evidence to raise
7 in the minds of the jury--", that's to raise in your mind, is
8 that a possibility? Could that be possible? And, from the
9 evidence can we adjudge that this did occur? "--the minds of
10 the jury by a reasonable doubt of his sanity at the time of the
11 act." All right. This document right here, which again, you
12 know, it is not ours -- this is the State's evidence. This is
13 a statement, that he says. Look at it. There is alcohol in
14 here, and there is drugs in here, and at the time of the crime
15 in this statement. There was alcohol and drugs, you know. Just
16 read it, and that's your evidence. Just because we haven't put
17 in evidence ourselves, doesn't mean you can't count evidence
18 for the defense. You see what I am saying? Just because they
19 introduce it doesn't mean it belongs to them by themselves.
20 This statement is as much ours for our defense, and for your
21 benefit, as it is for their prosecution and their evidence, and
22 you have to look at it.

23 In our society, ladies and gentlemen, we are faced with a
24 situation -- one, are we as educated human beings, as knowledgeable
25 people, going to sit right there and disregard the testimony of

1 medical doctors, because the crime that was committed was
 2 heinous, it was vicious, it was horrible, it was prominent
 3 people. You know, the Reverend and Mrs. Douglass were probably
 4 the finest people that will come down the -- will come on this
 5 earth. They were good people. But, that is not the issue.
 6 That is not the issue. And, the issue is being clouded. The
 7 issue is, is this man responsible mentally? Now, we know another
 8 thing, ladies and gentlemen, that this man in his state cannot
 9 be turned loose. Can't take him and turn him back loose, you
 10 know, you say, "Well, you didn't know what you are doing, go
 11 on downstairs and wait to get something to eat." That can't
 12 happen. And, it won't happen. We have got laws for that. It
 13 says so in these instructions -- you know 12A. 12A, right here.
 14 On the other hand, goes on in here and states about -- where is
 15 12A? Here it is. That he will be governed by procedures set
 16 forth in the Oklahoma Mental Health Law. Not that he is turned
 17 loose. Some people say, "Well, he is going to be turned loose."
 18 Huh-uh, that's not true.

19 Now, another question. The doctor said that his condition
 20 while treated with this drug, brings him back to a quasi state
 21 of normality. I believe that's in essence what he said. What
 22 does that mean, ladies and gentlemen? That means that the
 23 condition that this man has is treatable. What else did he say?
 24 "Without the drug he would revert back to the state that he was."
 25 That being incompetent, and a strong inference on insanity. So,

1 the doctors already said, the illness that this man suffers
 2 from is treatable. But, the State doesn't have the same kind
 3 of treatment as treatment. There treatment is incarceration in
 4 the penitentiary and lock up the door. There are other types
 5 of treatment for mentally ill people, and things of this sort.
 6 And, certainly I'm not going to ask, and I'm not standing here
 7 saying that I condone what happened, and that this man should
 8 go free and walk among the streets. I'm standing here saying,
 9 the man is mentally ill and we as a modern society -- as a modern
 10 society, certainly can consider that, and can consider the
 11 testimony of the psychiatrists.
 12 Now, let's say that we proceed on, and you say, "Well, gee,
 13 I don't know if he was suffering from this problem at that time,
 14 or not." The next question is. First you say, "Was he, or
 15 wasn't he?" "Gee, I don't know." "Is there a possibility that
 16 he could be?" Ask yourself, "Is there a possibility that that
 17 man could not distinguish the difference between right and wrong
 18 at the time this crime was committed?" You have to answer that
 19 question yes, or no. If the question comes up, "Well, yes, there
 20 is a possibility that that man was mentally ill or insane at
 21 that time from the testimony of that witness stand, from the
 22 statement, all of the evidence you heard, that possibility does
 23 exist." Then right here in this instruction it says, that you
 24 must give that benefit to the defendant. And, by giving that
 25 benefit to the defendant leaves you no alternative than to find

1 the defendant not guilty by reason of insanity. Let's go on,
 2 you say, "No, I think he knew what he was doing." Now, our
 3 next question is -- the man is mentally ill, we all agree to
 4 that, but yet today in El Reno, Oklahoma, Canadian County, we
 5 have got a jury in the box, we are determining the fate of another
 6 man for a crime that is violent, but yet we know as we stand
 7 right here today, right now, right this minute, that this man
 8 is mentally ill.

9 Now, what else do we know about this man? He is standing
 10 trial on two counts of Murder in the First Degree, and the
 11 State has got him pumped so full of tranquilizers. That he is
 12 he is on trial, ladies and gentlemen, for his life.

13 In closing, ladies and gentlemen, let me say this. You know,
 14 so much stress has been made about rights. Mr. James pointed
 15 out he was given his rights by the Sheriff. He was given his
 16 rights by this, he was given his rights by that. And, in the
 17 tone of his voice, he makes it sound like giving an accused
 18 individual his rights is something dirty. By his own actions.
 19 That there is something that is vile. But, it is awfully funny
 20 to me that we hear every day in our society, even our own law
 21 enforcement officials, they get themselves in a little trouble --
 22 either down in the penitentiary, or someplace else, they say,
 23 "I'm not going to make a statement, because it might violate my
 24 rights." And, even they crawl behind their rights. You know,
 25 so it is a two-edged sword. Rights belong to all of us -- all of

1 us, not just to Glen Burton Ake, but all of us. It is not
 2 something dirty, and it is not something that is supposed to
 3 be hampering law enforcement, as the tone of voice and the number
 4 of times it is brought out he was given his rights.

5 Another question: if you believe that there is a possibility
 6 the man could have been mentally ill, and you heard the doctor
 7 say that he doesn't accept our authority, did then in fact when
 8 he was given his rights to talk with them, accept his rights
 9 for what they were? Or, was he on a different level, thus not
 10 understanding what his rights are, because he accepts another
 11 authority other than this authority? The mere fact that you
 12 acquiesce to something, and you tell somebody something, in
 13 order to waive something you have got to understand what you are
 14 waiving. You know, you don't just waive something.

15 Another question. He is mentally ill right now. Was he
 16 mentally ill when that statement was given? A very good
 17 possibility. As the doctor said, a paranoid schizophrenic --
 18 a paranoid schizophrenic -- that's a different point. That's
 19 a decision you are going to have to make. But, let me say this,
 20 ladies and gentlemen, in your own deliberations there has got
 21 to be fear in your heart that what occurs when -- if we would
 22 find him Not Guilty by Reason of Insanity. The Court has very
 23 deliberately answered that question for you, because that has
 24 got to arrive, because it has got to be considered. That
 25 question when you deliberate has got to come up, and the Court

1 in it's wisdom has answered that question for you in Instruction 669
2 12A. "You are further instructed that if the defendant is
3 acquitted on the grounds that he was insane at the time of
4 the commission of the crimes--", and it goes on, and on, and
5 on, "in that event the District Attorney shall set forth,
6 prepare, sign and file a petition for commitment of the defendant",
7 and it shall be governed under the Oklahoma Mental Health Law.
8 So, it is not a mere hook him out the door situation. That's
9 not what we are asking. We are asking to judge a mentally sick
10 person, like you would judge a mentally sick person. The State
11 wants you to judge this man as a coldblooded killer. Now, you
12 see the distinction. The man is not, and did not at the time
13 this occurred, know what he was doing. Not saying what he
14 did was wrong, but in order to punish him under Murder in the
15 First Degree he has got to know -- he has got to know. And, I
16 think we have raised that issue sufficiently -- sufficiently
17 that you must consider -- I'm not as positive as Mr. James, but
18 I am giving you chapter six of his book. Because I had to use
19 his witnesses, all working for the State of Oklahoma, and the
20 Court.

21 Ladies and gentlemen, I can stand up here and talk forever,
22 but you in your own minds, and your own hearts know that this is
23 a question, this is an item that you have got to talk about.
24 You have got to do it. There is no way you can get around it,
25 if you do your job as a juror and give us the fair and impartial

1 trial we are entitled to. You have got to talk about it. 670

2 Another question. Keep in mind as we stand here right now
3 in this trial going on, and you are sitting there as the juror --
4 normal people, that you are sitting in judgment today of a mentally
5 ill person. That much I know we have proven. Right now, mentally
6 ill, medicated 200 milligrams of -- what is that? Thorazine,
7 Thiazine -- you know what it is. Have we reached the stage,
8 ladies and gentlemen, when we walk on the moon, and we travel
9 around the world, we fly airplanes, we drive cars, and we live
10 in nice homes, and we have got machines to pick wheat out of
11 the field, weed out the little grains and put them up in a
12 basket, but yet in our judicial system we can take a man that
13 is told by a psychiatrist that he is mentally ill, and treat
14 him like a normal human being when he is still at that level?
15 At what point in time does the barbaric instinct of the human
16 being in our society be replaced by the humanitarian aspects
17 by the sane people. Not the crazy -- by the sane people. When
18 do we start thinking like sane people? When do we start sitting
19 in judgment of sick people, and treating them as sick people,
20 instead of treating them as the criminal that is denoted by the
21 act?

22 We ask you, ladies and gentlemen, to consider it. Be fair
23 jurors, be openminded -- this is the Twentieth Century. There
24 is a thing in our society called mental illness. It is not
25 something that is swept underneath the carpet anymore. It is

1 of this trial, together with the cross examination of defense 714
2 witnesses -- the psychiatrists, each one of whom on cross
3 examination stated, this defendant, Glen Burton Ake, is dangerous,
4 he is volatile.

5 I would real quickly point out that our first aggravating
6 circumstance in section -- in Instruction Number 4A, the Court
7 has deleted, and that "The defendant knowingly created a great
8 risk of death to more than one person." Therefore, you should
9 not, and will not, in accordance with the instructions, consider
10 that aggravating circumstance. Therefore, our first aggravating
11 circumstance, "The murder was especially heinous, atrocious,
12 or cruel." The facts relied upon the State of Oklahoma to
13 support this aggravating circumstance, are as follows: "The
14 deceased, Richard Bary Douglass, while lying totally defenseless
15 and helpless on the floor with both his hands and feet bound,
16 and after having been gagged, was shot two times in the back."
17 That one, particularly, you should consider in view -- or, in
18 connection with, and conjunction with Instructions Number 5 and
19 Number 6, defining "especially" heinous, atrocious, or cruel,
20 "a pitiless crime which is unnecessarily tortuous to the victim."
21 "There was a design or intention to inflict a high degree of
22 pain or in which death was inflicted with utter indifference
23 to, or enjoyment of, the suffering of others." I think the
24 evidence, if you recall, bears out our aggravating circumstance.

25 Richard Bary Douglass was tied, his hands behind his back,

1 Third, "The existence of a probability that the defendant 716
2 would commit criminal acts of violence that would constitute
3 a continuing threat to society." The facts relied upon by the
4 State of Oklahoma to support this aggravating circumstance, are
5 as follows: "That in addition to the killing of Richard Bary
6 Douglass, and the other Bill of Particulars, Marilyn Sue Douglass,
7 occurring on the 15th day of October, 1979, and that on that
8 same date, said defendants did also shoot and kill one Marilyn
9 Sue Douglass, and in the other case Richard Bary Douglass, at
10 a time when the said Marilyn Sue Douglass was bound and helpless
11 and said defendants did shoot and gravely wound, on the same
12 date, one Leslie Douglass, a female, of the age of twelve years
13 at the time of said shooting, while the said Leslie Douglass
14 was bound and helpless. That on October 15, 1979, and at the
15 time of the murder of said Richard Bary Douglass, and in the
16 other Bill of Particulars, Marilyn Sue Douglass, said defendants
17 did shoot and gravely wound one Richard Brooks Douglass, age
18 sixteen at the time of said shooting, and at a time when the
19 said Richard Brooks Douglass was bound and helpless. That said
20 defendants were total strangers and unknown to Richard Bary
21 Douglass, Marilyn Sue Douglass, Leslie Douglass, and Richard
22 Brooks Douglass at the time of the said shootings." In addition
23 to those facts, we have added the testimony of the three
24 psychiatrists who have evaluated Glen Ake's mental illness, and
25 say he is dangerous to society. "That should said defendants

Cite as 663 P.2d 1 (Okla. Cr., 1983)

Glen Burton AKE, a/k/a Johnny
Vandewater, Appellant.

The STATE of Oklahoma, Appellee.

No. F-66-622.

Court of Criminal Appeals of Oklahoma.

April 12, 1983.

Defendant was convicted before the District Court, Canadian County, James D. Bednar, J., of two counts of murder in the first degree and two counts of shooting with intent to kill, and he appealed. The Court of Criminal Appeals, Bussey, P.J., held that: (1) defendant was not prejudiced by trial court's failure to grant a second preliminary hearing; (2) trial court did not err in dismissing prospective juror who stated that she could not impose the death penalty on anyone; (3) evidence sustained finding that defendant's confession was knowingly and voluntarily given; (4) trial court did not err in admitting photograph which demonstrated how defendant rendered his victim helpless before murdering him; (5) prosecutor who stated in closing argument that there was "no doubt" that defendant was guilty was permissibly arguing State's conclusions based upon the evidence in the case; (6) trial court did not abuse its discretion in refusing jury's request that testimony of defense witness be repeated, since there was no reason to believe that jury did not hear and understand that witness' testimony as it was given in court; (7) defendant failed to establish any reasonable doubt as to his sanity at the time the crimes were committed; and (8) evidence sustained jury's finding of aggravated circumstances.

Affirmed.

1. Criminal Law — 134(2), 1044.2(1)

Defendant's change of venue motion which was not verified by affidavit or supported by affidavit of at least three credible persons residing within the county failed to

comply with applicable statutory procedure and was therefore not properly before trial court, and likewise it was not properly before Court of Criminal Appeals. 22 O.S. 1981, § 561.

2. Jury — 103(1)

It is not necessary that juror be completely ignorant of facts and circumstances surrounding the case; it is sufficient if juror can disregard his or her own opinion in rendering verdict based on the evidence presented.

3. Criminal Law — 1035(5)

Defendant who waived his last two peremptory challenges could not complain of juror bias on appeal.

4. Criminal Law — 1044(3)

Defendant who failed to preserve in motion for new trial his contention that trial court erred by not granting a second preliminary hearing thereby waived any error that occurred.

5. Criminal Law — 237

Trial court did not abuse its discretion in failing to grant defendant a second preliminary hearing to determine defendant's ability to assist his attorneys; since defendant announced ready at preliminary hearing, no attempt was made to raise the issue of his ability to assist counsel, defendant profited from the preliminary hearing, and there was no showing of prejudice arising out of failure to grant second preliminary hearing.

6. Jury — 108

Trial court did not err in dismissing prospective juror who stated that she could not impose the death penalty on anyone.

7. Criminal Law — 1035(5), 1044(6)

Any error arising out of trial court's dismissal of prospective juror who stated that she could not impose the death penalty on anyone was waived as the result of defendant's failure to object when juror was excused or to preserve the error in new trial motion.

8. Costs — 302.3, 302.4

State does not have the responsibility of providing court-appointed psychiatrist and court-appointed investigator to indigents charged with capital crimes.

9. Criminal Law — 1044(6)

Defendant who failed to preserve in new trial motion his contention that trial court erred in failing to provide services of court-appointed psychiatrist thereby waived the matter.

10. Criminal Law — 636(1)

Fact that defendant was sustained on medication throughout his trial did not deprive defendant of his statutory and constitutional rights to be present at trial, since the medication was administered pursuant to orders of doctors who treated defendant at state hospital and who informed trial court that defendant was competent to stand trial, and could assist his attorney, provided he continued to take prescribed medication.

11. Criminal Law — 625

Trial court was not under a duty to raise, sua sponte, the issue of defendant's present sanity as the result of fact that defendant was sustained on medication throughout his trial, since defendant's medication was prescribed by doctors who treated defendant at state hospital and who informed trial court that defendant was competent to stand trial provided he continued taking the prescribed medication, and trial court was not bound to deduce from defendant's demeanor that a hearing was necessary.

12. Criminal Law — 531(3)

Evidence at suppression hearing sustained finding that defendant's confession was knowingly and voluntarily given.

13. Criminal Law — 1044(4)

Defendant who failed to preserve in motion for new trial his contention that confession, in its deleted form, was prejudicial, thereby failed to properly preserve the issue for appeal.

14. Criminal Law — 1100.12

Defendant was not prejudiced by the admission of confession which contained blank spaces and blank pages as the result of trial court's deletion of references to other crimes.

15. Criminal Law — 435(5)

In prosecution for murder, trial court did not err in admitting photograph which demonstrated how defendant rendered his victim helpless before murdering him, since the photograph was not gruesome and did not unfairly prejudice defendant.

16. Criminal Law — 600(1)

It is incumbent upon defense attorney to raise an objection to introduction of evidence of other crimes, lest the error be waived.

17. Criminal Law — 1100.11, 1171.2(9)

In prosecution for murder and shooting with intent to kill, admission of testimony concerning defendant's attempt to rape one of the victims and trial court's failure to give a limiting instruction was harmless, since evidence presented against defendant was overwhelming and jury would have rendered the same verdict and imposed the same sentence had the evidence not been presented or had the instruction been given.

18. Criminal Law — 720(7)

Prosecutor who stated in closing argument that there was "no doubt" that defendant was guilty was permissibly arguing State's conclusions based upon the evidence in the case.

19. Criminal Law — 1171.1(6)

Prosecutor's statement in closing argument to the effect that if the criminal charges had not been pending, defendant would have gone out on the street a free man, which statement was made in response to defendant's argument that, if found to be insane, he would not be "turned loose," did not require modification or reversal of conviction, since jury was properly instructed concerning consequences of an innocent by reason of insanity verdict, and evidence against defendant was so overwhelming that it was inconceivable that verdict was based solely on the remarks.

20. Criminal Law — 1042

Remarks made by prosecutor during sentencing stage of trial did not rise to the level of fundamental error as to require reversal in absence of objections at trial.

21. Criminal Law — 1174(5)

Failure to return jury to courtroom for consideration of jury's note requesting that testimony of a defense witness be repeated was harmless, since trial court replied to jury's request in writing and counsel for both sides were given opportunity to object to both form and substance of the note. 22 O.S. 1981, § 894.

22. Criminal Law — 859

Trial court did not abuse its discretion in refusing jury's request that testimony of defense witness be repeated, since there was no reason to believe that jury did not hear and understand that witness' testimony as it was given in court.

23. Criminal Law — 1119(1)

On appeal from conviction of murder and shooting with intent to kill, record failed to support defendant's contention that lack of air conditioning in courthouse in which trial and jury deliberations were conducted forced the jury to return guilty verdict without proper deliberation.

24. Criminal Law — 311, 570(2)

In every case there is an initial presumption of sanity, and that presumption remains until defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime; if the issue is so raised, burden of proving defendant's sanity beyond a reasonable doubt falls upon state.

25. Homicide — 227

In prosecution for murder and shooting with intent to kill, defendant failed to establish any reasonable doubt as to his sanity at the time the crimes were committed.

26. Criminal Law — 1044(1)

Defendant's allegation that the felony-murder doctrine was unconstitutional was not properly before Court of Criminal Appeals, since it was not preserved in the motion for new trial.

27. Criminal Law — 1044(1)

Statute holding defendant in a capital case to proof of mitigating circumstances in sentencing stage of bifurcated trial was not contrary to the due process principle that state must carry the burden of proving defendant's guilt beyond a reasonable doubt. 21 O.S. 1981, § 701.11.

28. Criminal Law — 1266(2)

Homicide — 254

Evidence in prosecution for murder in the first degree and shooting with intent to kill sustained finding that murder was especially heinous, atrocious or cruel, that the murders were committed to avoid or prevent a lawful arrest or prosecution, and that a probability existed that defendant would commit criminal acts of violence that would constitute a continuing threat to society, and because the death sentences for those murder charges were not imposed under the influence of passion, prejudice or any other arbitrary factor and because the death sentences were not excessive or disproportionate to those imposed in other cases, imposition of the sentences of death would be affirmed.

An appeal from the District Court of Canadian County; James D. Bodnar, Judge.

Glen Burton Aka, a/k/a Johnny Vandover, appellant, was convicted of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill in the District Court of Canadian County, Oklahoma, Case Nos. CRF-79-302, CRF-79-303, CRF-79-304, CRF-79-305. He was sentenced to death for each murder count and to 500 years' imprisonment for each shooting with intent to kill count, and appeals. **AFFIRMED.**

Richard D. Strubhar, Reta M. Strubhar, Yukon, for appellant.

Jan Eric Cartwright, Atty. Gen., Chief, Appellate Crim. Div., Oklahoma City, for appellee.

OPINION

BUSSEY, Presiding Judge:

The appellant, Glen Burton Aka, also known as Johnny Vandover, was convicted by a jury in Canadian County, Oklahoma, of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill. He was sentenced to death for each of the murder charges, and sentenced to a five-hundred year prison term for each of the shooting with intent to kill counts. He has perfected a timely appeal to this Court.

On the evening of October 15, 1979, in search of a suitable house to burglarize, the appellant and his accomplice, Steven Keith Hatch, a/k/a Steve Lisenbee, drove their borrowed car to the rural home of Reverend and Mrs. Richard Douglass. The appellant gained entrance into the Douglass' home under the pretense that he was lost and needed help finding his way. After an initial conversation with sixteen-year-old Brooks Douglass in the entrance way of the Douglass' home, the appellant returned to his car, supposedly to get a telephone number. The appellant thereupon re-entered the house and produced a firearm. He was joined shortly afterwards by his accomplice, who also was armed.

The appellant and his accomplice ransacked the Douglass' home as they held the family at gunpoint. They bound and gagged Reverend Douglass, Mrs. Douglass and Brooks Douglass, and forced them to lie in the living room floor.

The two men then took turns attempting to rape twelve-year-old Leslie Douglass in a nearby bedroom. Having failed in their attempts, they bound and gagged Leslie, and forced her to lie in the living room floor with the other members of her family.

Throughout the episode, the appellant and his accomplice repeatedly threatened to kill all the members of the Douglass family, and covered their heads with articles of clothing as they lay helpless on the floor.

1. The murder/shootings of the Douglass family

The appellant instructed his accomplice to go outside, turn the car around, and "listen for the sound." The accomplice left the house as he was told. The appellant then shot Reverend Douglass and Leslie each twice with a .357 magnum pistol, Mrs. Douglass once, and Brooks once; and fled.

Mrs. Douglass died almost immediately as a result of the gunshot wound. Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and drive to the nearby home of a doctor.

The appellant and his accomplice were apprehended in Colorado following a month-long crime spree which took them through Arkansas, Louisiana, Texas, and much of the Western half of the United States.

Subsequent to their extradition to Oklahoma, Leslie Douglass identified the appellant in a lineup. The appellant confessed to the shootings.

The error first alleged by the appellant is that the trial court wrongfully refused to grant a change of venue. He argues the pre-trial publicity concerning the crime and events occurring subsequent thereto, including the fact that the appellant's accomplice had earlier been found guilty of the crime at issue and sentenced to death, was of such an extent as to bias the community against him, thereby denying him the benefit of an impartial jury.

[1-3] The appellant failed to comply with the statutory procedure for change of venue mandated by 22 O.S.1981, § 501. The motion was not verified by affidavit, nor was it supported by the affidavits of at least three credible persons residing within the county. Thus, the motion not having been properly before the trial court, is likewise not properly before this Court. See, *Iris v. State*, 617 P.2d 588 (Okla.Cr.1980); *Bruton v. State*, 521 P.2d 1382 (Okla.Cr. 1974); *Adams v. State*, 25 Okla.Cr. 298, 299 P. 59 (1922). The motion was properly overruled.

attracted a significant amount of media attention.

The appellant next alleges that the trial court erred by not granting a second preliminary hearing in this case. The appellant's preliminary hearing was held jointly with his accomplice on January 21, 1980. He was ejected from his February 14, 1980, arraignment for disruptive behavior. One week later, the judge who presided at the arraignment, on his own motion, ordered the appellant to undergo psychiatric evaluation. On April 10, 1980, a special sanity hearing was held at which the appellant was found to be mentally ill and ordered committed to Eastern State Mental Hospital for observation and treatment. He was subsequently adjudged competent to stand trial, and the proceedings against him reinstated on May 27, 1980.

The appellant filed a motion requesting a second preliminary hearing. He argued that he was unable to assist his attorneys at the January 21, 1980, preliminary hearing because of his lack of competency. The motion was overruled.

The appellant announced ready at the preliminary hearing. No attempt was made to raise the issue of his ability to

tion in Oklahoma. Most, if not all, of the jurors in this case had been exposed to various forms of media accounts of the crimes and the events subsequent thereto. The appellant attempts to bolster his contention with the results of a poll conducted on behalf of his accomplice and himself, which indicated that forty-four percent of those surveyed believed the appellant to be guilty prior to his trial. Additionally, the appellant has provided this Court with a copy of an advertisement used by the Sheriff of Canadian County in his bid for re-election, which depicts the handcuffed appellant being escorted by that sheriff. The caption of the picture was, "Quality law enforcement takes a tough, dedicated professional—let's keep Lynn Steedman Sheriff."

It is not necessary that a juror be completely ignorant of the facts and circumstances surrounding a case. It is sufficient if the juror can disregard his/her own opinion and render a verdict based on the evidence presented. *Irvin v. Dowd*, 386 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Russell v. State*, 528 P.2d 336 (Okla. Cr.1974). In this case, after extensive examination by counsel for both sides, each juror stated he/she could do so.

In addition, we note that the trial court did not rule on the motion to change venue until completion of the voir dire to determine the

assist counsel. We cannot presume, absent any supporting evidence, that the appellant was incompetent at that time. A review of the transcript of the preliminary hearing reveals that the appellant did indeed profit from the preliminary hearing. Counsel for the appellant thoroughly and adequately cross-examined witnesses offered by the State. He raised the issue through cross-examination of the appellant's state of mind during the criminal episode, and challenged one of the surviving victims' identification of the appellant as the man who shot him. The appellant also put on witnesses and obtained copies of police and medical reports.²

[4] The appellant failed to preserve the issue in the motion for a new trial. Had any error occurred, it was thereby waived. *Stevenson v. State*, 637 P.2d 878 (Okla. Cr.1981).

[5] In addition, the appellant has not shown he was prejudiced at trial by the failure to grant the second preliminary hearing. There was no fundamental error. We conclude that the judge did not abuse his discretion.

extent of the bias, if any, that existed in the minds of the veniremen. The appellant was afforded wide latitude in examination of the veniremen. This procedure afforded the appellant ample time to weed out unsatisfactory or biased jurors. Moreover, the appellant waived his last two peremptory challenges. Having done so, he cannot complain of juror bias on appeal. *Carpitcher v. State*, 586 P.2d 75 (Okla. Cr.1978).

2. In regard to this matter, we note that the appellant focuses his argument in this allegation of error upon a statement made by the judge while denying the motion. At one point, the judge stated, "It [the preliminary hearing] is not designed as a deposition-type hearing for the defendant to make a great deal of discovery." Although the language of *Beard v. Ramey*, 456 P.2d 587 (Okla. Cr.1969), reveals the erroneous flavor of the judge's statement, we find it to be of little consequence. As demonstrated in the text, the preliminary hearing did in fact work as a discovery device for the appellant.

Additionally, we note that the judge did not base his ruling solely on this factor. Thus, the appellant's argument, while possessing some merit, gains him nothing.

[6] The appellant alleges in his next assignment of error that a prospective juror was dismissed in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).³

We find no error in this matter. The form and substance of the questions were very similar to those we approved in *Chasey v. State*, 612 P.2d 269 (Okla. Cr.1980); and the answers given by the juror indisputably satisfy the *Witherspoon* concern. See, 88 S.Ct. at 1777 n. 21.

[7] In addition, the appellant did not examine the prospective juror, did not object when she was excused, and did not preserve the error in the motion for a new trial. Thus, had any error occurred, it was waived. *Hays v. State*, 617 P.2d 223 (Okla. Cr.1980).

[8] The appellant's ninth assignment of error is that he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist and a court-appointed investigator as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses.

We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes. *Irvin v. State*, 617 P.2d 588 (Okla. Cr.1980); and cases cited therein.

3. The appellant's argument revolves around the following dialogue excerpted from the record:

THE COURT: This is a case in which the State of Oklahoma is seeking the death penalty, and I will ask you this question. In a case where the law and the evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the death penalty?

MRS. WOLFE: No, sir, I could not.

THE COURT: All right. Let me ask you this. Knowing that the law provides for the death penalty in certain proper cases, and knowing that the State will ask you to bring back a verdict of death in this case, and considering your reservations about the death penalty, do you have such conscientious opinions as would prevent you from making an impartial

[9] In addition, the argument was not preserved in the motion for new trial. It was thereby waived. *Hawkins v. State*, 569 P.2d 490 (Okla. Cr.1977).

The appellant's next two allegations of error concern the fact that he was sustained on 600 milligrams of Thorazine per day throughout his trial. The medication was administered pursuant to the orders of the doctors who treated him at Eastern State Hospital at Vinita. Dr. R.B. Garcia informed Judge Martin (who was originally to preside over the case) by letter dated May 22, 1980, that the appellant was competent to stand trial, and could assist his attorney, provided he continue taking the prescribed medication.

The appellant remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings. He argues that, because of the effect of the Thorazine, he was not actually present at his trial; and thereby denied his statutory and constitutional rights. Secondly, he argues that, due to his conduct at trial, the trial court should have halted the proceedings and impaneled a jury to evaluate his present sanity.

[10] Both of these issues boil down to the question of whether the Thorazine medication rendered him unable to understand the proceedings against him and affected his ability to assist counsel. *Beck v. State*, 626 P.2d 327 (Okla. Cr.1981).

Dr. Garcia testified that he had diagnosed the appellant's condition as schizophrenia of

decision as to whether the defendant is guilty or not guilty?

MRS. WOLFE: Sir, I could not impose the death penalty on anyone.

THE COURT: All right. I need to ask you one other question. If you found beyond a reasonable doubt that the defendant was guilty of Murder in the First Degree, and if under the evidence, facts, and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such that regardless of the law, the facts, and circumstances of the case, you still would not consider fairly the imposition of the death penalty?

MRS. WOLFE: No, Sir.

the paranoid type, which necessitated maintenance on the Thorazine to stabilize his personality. Dr. Garcia further testified that, although the dosage of Thorazine which the appellant was taking would sedate a normal individual, it had a therapeutic effect of eliminating the symptoms of the appellant's condition. Without the benefit of the medication, the appellant could revert to a violent and dangerous state.

In the letter to Judge Martin, referred to above, Dr. Garcia stated the appellant, with the benefit of medication, was competent to stand trial and assist his attorneys in his defense. The appellant remained on his prescribed medication, and there is no evidence that any change in his competency occurred in the month between his release from Vinita and his trial. Thus, we have no reason to believe the appellant's behavior was caused by any factor other than his own volition.⁴

The appellant additionally asserts that, according to *Peters v. State*, 516 P.2d 1372 (Okla.Cr.1973), the trial court was under a duty to first cite the appellant for contempt of court, and, secondly to bind and gag him before allowing the use of drugs to sedate him through his trial. This argument misconstrues the purpose behind the medication given the appellant. The appellant's disruptive behavior at his preliminary hearing gave rise to the proceedings which eventually led to his commitment at Vinita and ensuing treatment with Thorazine. However, even though the treatment indirectly resulted from the appellant's misbehavior, the Thorazine was not administered to him for the sole purpose of rendering him sufficiently tranquil to facilitate progress of the criminal proceedings instituted against him. Thus, the appellant's reliance on *Peters* is misplaced.

4. It is quite possible that the defense of insanity interposed by the appellant fostered such behavior on his part. Nonetheless, the jury was well aware of the fact that the appellant was being maintained on the Thorazine. The appellant was present throughout the trial, and his demeanor was readily discernable by the jurors. Notwithstanding the appellant's "abnormal" behavior at trial, the jury determined that he was sane.

Likewise, we disagree with the contention that the appellant should have been treated as an insane person, incapable of standing trial, because of the necessity of Thorazine treatment to "normalize" him. Psychopharmaceutical restoration of persons to a state of normality is not an uncommon practice in modern society. If a defendant may be rendered competent to assist in his defense through the use of medication, it is in the best interests of justice to afford him a speedy trial. See, *State v. Stacy*, 556 S.W.2d 552 (Tenn.Cr.1977); and cases cited therein. See also, *State v. Jozola*, 89 N.M. 480, 553 P.2d 1295 (1976).⁵

[11] Concerning the trial court's failure to impanel a jury to determine the present sanity of the appellant, we note initially that the appellant's attorneys voluntarily withdrew the motion for trial on present sanity because the appellant had just been returned from Vinita, certified as competent to stand trial. Since the motion was withdrawn, the court obviously had no occasion to rule on it. We cannot say that the court was under a duty to raise the issue *sua sponte*. In light of the facts that the appellant had been released from Vinita one month before, certified as competent to stand trial, and that he was maintaining his medication; the trial court had no good reason to order a trial on the appellant's present sanity. Although the appellant's refusal to communicate with his attorneys was brought to the attention of the trial judge, and although the appellant's demeanor was observable, it does not necessarily follow that the trial court was bound to deduce from such behavior that another hearing was needed.

5. One notable case contra to our holding is *State v. Maryott*, 6 Wash.App. 98, 492 P.2d 239 (1971), wherein it was held that a defendant was improperly tried while being maintained on medication. The defendant in that case stared vacantly ahead throughout the trial as did the appellant in this case. It must be noted, however, that the defendant in that case was taking a combination of several drugs, all of which were known to be strong depressants with notable side effects.

According to the statute authorizing trials on present sanity, a doubt must arise as to the defendant's sanity. 22 O.S.1981, § 1162. The doubt referred to in the statute has been interpreted to be doubt which must arise in the trial court's mind after an evaluation of the facts, information concerning the defendant's insanity and motive. *Beck v. State*, supra; *Reynolds v. State*, 575 P.2d 628 (Okla.Cr.1978); *Emmell v. State*, supra. The existence of doubt of the defendant's sanity must arise from facts and circumstances of a substantial character. There must be reason to believe that the defendant's claim of insanity is genuine and not simulated to delay justice. *Bingham v. State*, 82 Okla.Cr. 5, 165 P.2d 646 (1946); *Laskovich v. State*, 377 P.2d 977 (Okla.Cr.1963). The appellant's demeanor was but one factor to consider in light of the facts and circumstances in this case. We cannot say the judge abused his discretion in failing to order a trial on present sanity. *Reynolds*, supra; *Beck*, supra.

The appellant's next two allegations of error concern the confession he gave to the police after his arrest. The confession was forty-four (44) typewritten pages in length. It contained detailed descriptions of the shootings of the Douglass family, as well as events which occurred before and after.

[12] Initially, the appellant argues he was insane when he made the confession, thus it was involuntary. However, the appellant failed to establish any doubt of his sanity at the time the crime was committed. The sheriff who took the confession testified the appellant understood his rights, and voluntarily waived them. The confession was lucid and detailed. The appellant read the lengthy typewritten copy of the confession, corrected spelling errors and filled in missing details. Lastly, although the appellant was adjudged incompetent to stand trial approximately five months after the crime was committed, none of the psychologists who examined him could offer an opinion of the state of the appellant's mental condition prior to the time they observed him.

We are of the opinion the confession was knowingly and voluntarily given. See, *Watkins v. State*, 572 P.2d 998 (Okla.Cr.1977).

The appellant's second allegation concerning the confession stems from the fact that the trial court deleted parts of the confession, because it contained information of other crimes committed by the appellant and his accomplice subsequent to the Douglass shootings. The deleted confession contained blank spaces and blank pages. The appellant maintains that the confession, in its deleted form, was prejudicial.

[13, 14] This allegation of error was not preserved in the motion for new trial. It has thus not been properly preserved for appeal. *Turnman v. State*, 522 P.2d 247 (Okla.Cr.1974). In addition, we do not agree that the appellant was prejudiced by the form of the confession.

[15] In the appellant's fifth assignment of error, he argues that numerous photographs were unduly prejudicial and should not have been admitted into evidence. A review of both the trial transcript and the exhibits before us in the record reveals that all but one of the photographs complained of were indeed excluded by the trial court pursuant to the appellant's objection. The photograph which was admitted over the appellant's objections portrayed the nature in which one of the victim's feet were bound. The photograph served to demonstrate how the appellant in this case rendered his victim helpless before he brutally murdered him. The photograph was not gruesome, and did not unfairly prejudice the appellant. The trial court did not abuse its discretion in admitting the picture. *Holloway v. State*, 602 P.2d 218 (Okla.Cr.1979).

Next, the appellant alleges the trial court erred by allowing Brooks and Leslie Douglass, the two surviving victims, to testify concerning the appellant and his cohort's attempt to rape Leslie. He additionally argues that the trial court erroneously failed to instruct the jury concerning the alleged other crimes.

[16] The appellant failed to object to the testimony of which he now complains. Additionally, he failed to include it in the motion for new trial. The appellant has completely failed to bring the error, if any, to the attention of the trial court. As we stated in *Burks v. State*, 594 P.2d 771 (Okla. Cr. 1979), it is incumbent upon the defense attorney to raise an objection to the introduction of evidence of other crimes, lest the error be waived.

[17] In addition, we hold that the admission of the testimony and the trial court's failure to give a limiting instruction was harmless. The evidence presented against the appellant in both stages of the trial was overwhelming. We are convinced that the jury would have rendered the same verdict and imposed the same sentences had the evidence not been presented, or had the instruction been given. *Burks supra*; *Luman v. State*, 626 P.2d 869 (Okla. Cr. 1981).

The appellant's twelfth and thirteenth allegations are that the prosecutor impassioned the jury with improper arguments in both stages of the trial.

[18] The prosecutor stated numerous times in the closing argument of the first stage that there was "no doubt" the appellant was guilty. The prosecutor was permissibly arguing the State's conclusions based upon the evidence in the case. *Williams v. State*, 557 P.2d 930 (Okla. Cr. 1976). In addition, the authority cited by the appellant in support of his argument are clearly inapplicable. See, *Evans v. State*, 546 P.2d 284 (Okla. Cr. 1976) (wherein the prosecutor stated, "And I think you'll return a verdict of guilty because that's what I think he is").

[19] The prosecutor in this case also stated that, "If we hadn't had these charges pending, he [the appellant] would have gone out on the street a free man." The statement was made in response to the appellant's argument that, if found to be insane, he would not be "turned loose." The prosecutor argued that the appellant had been sent to a mental hospital, treated and released. Thus, the gist of the prosecutor's

argument was that the appellant would be, in effect, set free if found to be insane.

Although the prosecutor would have been better advised not to make such an argument, we do not find it of such magnitude to mandate modification or reversal. *Chaney v. State*, 612 P.2d 289 (Okla. Cr. 1980). The jury was properly instructed concerning the consequences of an innocent by reason of insanity verdict. In addition, the evidence against the appellant was so overwhelming that it is inconceivable the verdict was based solely on such a remark. *Chaney, supra*.

[20] The appellant additionally complains of remarks made by the prosecutor during the second stage of the trial. The appellant admits in his brief that no objections were made. After careful examination of the record, we can find no error which rises to the level of fundamental error.

The appellant's tenth assignment of error concerns a note from the jury in which it was requested that the testimony of Dr. R.D. Garcia, a psychologist who testified for the defense, be repeated. The trial court declined to have a transcript of the testimony sent to the jury. The appellant alleges error on two grounds; first, that the jurors were not brought into open court for consideration of the note, pursuant to 22 O.S. 1981, § 894, and secondly that Dr. Garcia's testimony was not read to the jury.

[21] The appellant failed to object to the jury's absence during the court's discussion of the note. In addition, he failed to properly preserve the arguments for appeal in the motion for new trial. Nonetheless, we note that the trial court replied to the jury's request in writing, and that counsel for both sides were given opportunity to object to both the form and substance of the note. As we stated in *Boyd v. State*, 572 P.2d 276 (Okla. Cr. 1977), the purpose of 22 O.S. 1981, § 894, is to prevent certain communications from being made outside of open court which might influence the jury when both parties have not at least had a chance to be present to protect their inter-

ests. Thus, although the jury should have been returned to the courtroom pursuant to § 894, failure to do so here was harmless. *Boyd, supra*; see also, *Starr v. State*, 602 P.2d 1046 (Okla. Cr. 1979).

[22] In response to the appellant's second argument that the jury should have been allowed to rehear Dr. Garcia's testimony, we note that the decision to allow or disallow the jury's request lies within the discretion of the trial court. *Jones v. State*, 456 P.2d 610 (Okla. Cr. 1969). The appellant contends that, as evidenced by the "choppy record," it was difficult for the jury to understand Dr. Garcia's testimony. We cannot agree with the appellant's assessment of the nature of Dr. Garcia's transcribed testimony. From the record before us, we have no reason to believe that the jury did not hear and understand Dr. Garcia's testimony as it was given in court. Accordingly, we decline to hold that the trial court abused its discretion. *Jones, supra*.

[23] The appellant next alleges that the lack of air conditioning in the courthouse in which the trial and jury deliberations were conducted forced the jury to return the verdict without proper deliberation. The appellant has failed to cite, nor can we find, any evidence in the record to support such a contention. Although the courtroom may have been somewhat uncomfortable, there is no evidence that the jury failed to exercise utmost diligence in reaching its verdict. Indeed, upon having been given the opportunity to recess for the night, and wait until the following morning to begin deliberations in the second stage, the jury elected to remain and deliberate. The contention is clearly without merit.

In his fifteenth allegation of error, the appellant maintains that the verdict was against the clear weight of the evidence. He argues the jury should have returned a verdict of not guilty by reason of insanity.

[24] In every case there is an initial presumption of sanity. This presumption remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his

sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State. *Rogers v. State*, 634 P.2d 743 (Okla. Cr. 1981); *Richardson v. State*, 569 P.2d 1018 (Okla. Cr. 1977).

[25] The appellant had no history of mental illness. When each of the three doctors who testified on behalf of the appellant was asked whether he had an opinion as to the appellant's ability to distinguish between right and wrong at the time of the shootings, each answered in the negative. They could only testify as to their opinions that the appellant was "mentally ill" several months after the crimes had occurred.

The appellant clearly failed to establish any reasonable doubt as to his sanity at the time the crimes were committed. The jury was properly instructed concerning the standard of sanity and the burden of proof. We cannot agree that the jury's verdict was against the weight of the evidence. *Rogers, supra*.

The appellant's eighteenth assignment of error is that the accumulation of errors alleged in the foregoing assignments of error mandates reversal in this case. We have held in the past that if a defendant's previous assignments of error are found to be without merit, the argument which asks that those previous allegations be considered collectively is likewise without merit. *Brinlee v. State*, 543 P.2d 744 (Okla. Cr. 1975); *Haney v. State*, 503 P.2d 909 (Okla. Cr. 1972). Since we have found all of the appellant's allegations of error to be without merit, we find this argument meritless also.

[26] The appellant's seventeenth allegation of error is that the felony-murder doctrine is unconstitutional. This allegation is not properly before this Court, as it was not preserved in the motion for new trial. *Turman v. State, supra*.

[27] The appellant argues in his nineteenth assignment of error that the statutory scheme of 21 O.S. 1981, § 701.11 unconstitutionally shifts the burden of proving mitigating circumstances onto defendants in

capital cases after aggravating circumstances are proven by the State.

We note initially that the issue is not properly before this Court, because it was not preserved in the motion for new trial. *Ferman v. State*, supra. Nonetheless, due to the nature of the contention, we shall consider it.

In support of his contention, the appellant cites *Mullaney v. Wilbur*, 421 U.S. 684, 36 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Bauer v. State*, 3 Okl.Cr. 529, 107 P. 526 (1910); *Meadows v. State*, 487 P.2d 389 (Okl.Cr.1971); and *Pettigrew v. State*, 564 P.2d 1186 (Okl.Cr.1978). None of the authority cited supports the appellant's contention. These cases stand for the rule that a defendant in a criminal case cannot be constitutionally required to produce evidence to negate or mitigate the degree of a criminal charge against him. *Mullaney v. Wilbur*, supra.

In the present case, the statute in question addresses the nature of the punishment to be imposed after the determination of guilt has been made. Thus, the considerations relevant to the guilt determination espoused in the cases cited by the appellant are inapplicable. The appellant was not required to produce any evidence in support of mitigation at all. However, since he chose to have the jury consider factors which he hoped to justify his appeal for leniency, it was incumbent upon him to prove their existence. The defendant is in the best position to know of and present evidence in mitigation. See, *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (Ariz.Sup. 1978). To hold a defendant in a capital case to proof of mitigating circumstances in the sentencing stage of a bifurcated trial, should he so choose to raise them, is not contrary to the Due Process principle that the State must carry the burden of proving a defendant's guilt beyond a reasonable

doubt. *Winship*, supra; *Mullaney*, supra; *Watson*, supra.

[25] Lastly, we review the sentences imposed upon the appellant as mandated by 21 O.S.1981, § 701.12.

We are of the opinion that the sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor. Our discussion of the appellant's various allegations concerning this issue in the text of this opinion reveal that the appellant's sentences were imposed in accordance with the evidence presented, free from the taint of passion and prejudice. In addition, as previously discussed, the evidence against the appellant was overwhelming in both stages, and provide ample justification for the penalty imposed.

Likewise, we are of the opinion the evidence supports the finding of the aggravating circumstances. The jury found the aggravating circumstances justifying the imposition of the death penalty to be: 1) that the murder was especially heinous, atrocious or cruel; 2) that the murders were committed to avoid or prevent a lawful arrest or prosecution; and 3) that a probability existed that the appellant would commit criminal acts of violence that would constitute a continuing threat to society.

The appellant in this case invaded the sanctity of his victims' home, bound each one and forced them to lie in the floor. The appellant and his accomplice discussed killing the family, and made them promise not to call the police if allowed to live. Unhindered by Mrs. Douglass' plea for their lives, the appellant ruthlessly emptied a .357 magnum pistol into the bodies of the helpless victims before he fled their home. We believe the facts adequately support each of the three aggravating circumstances found by the jury.

Lastly, we find that the sentences of death are not excessive or disproportionate to those imposed in other cases.⁶

(Okl.Cr.1980); *Eddings v. State*, 616 P.2d 1139 (Okl.Cr.1980) (remanded for resentencing, 455 U.S. 104, 102 S.Ct. 908, 64 L.Ed.2d 1); *Chamney v. State*, 612 P.2d 209 (Okl.Cr.1980).

6. *Smith v. State*, 608 P.2d 330, 54 OBAJ 432 (Okl.Cr.1983); *Parks v. State*, 651 P.2d 696 (Okl.Cr.1982); *Jones v. State*, 648 P.2d 1231 (Okl.Cr.1982); *Hayes v. State*, 617 P.2d 223

We have also compared this case to other capital cases which have been modified to life or reversed for other reasons.⁷

Having fully reviewed the record and arguments presented on appeal, we find no reason to interfere with the jury's decision. The judgments and sentences are AF-FIRMED.

CORNISH and BRETT, JJ., concur.

David Michael BLACKWELL, Appellant,

The STATE of Oklahoma, Appellee.

No. F-80-688.

Court of Criminal Appeals of Oklahoma.

April 20, 1983.

Defendant was convicted in the District Court, Cleveland County, Alan J. Couch, J., of first-degree murder, and he appealed. The Court of Criminal Appeals, Brett, J., held that: (1) confessions given by defendant after he had been informed of his rights and was told that only district attorney was empowered to offer immunity were admissible as confessions voluntarily made to police officers, despite defendant's claimed expectation that his actions would lead to negotiation of plea bargain; (2) evidence of crime of arson was admissible at murder trial, since burning of car was part of entire transaction surrounding events leading up to victim's death and immediately thereafter; (3) evidence was sufficient to sustain conviction; (4) verdict

7. *Jones v. State*, 680 P.2d 634, 34 OBAJ 661 (Okl.Cr.1983); *Driskell v. State*, 659 P.2d 343, 54 OBAJ 460 (Okl.Cr.1983); *Bougwell v. State*, 659 P.2d 322, 54 OBAJ 402 (Okl.Cr.1983); *Munn v. State*, 658 P.2d 482, 54 OBAJ 402 (Okl.Cr.1983); *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982); *Hall v. State*, 650 P.2d 893 (Okl.

form giving no indication which offense jury agreed upon as underlying felony to felony-murder provided constitutionally guaranteed unanimous verdict; (5) evidence was sufficient to support finding that defendant committed rape, even though his involvement may have been limited to overcoming resistance of victim by brandishing knife; (6) defendant was not deprived of substantial right by trial court's failure to admonish jury that no evidentiary weight could be placed on defendant's failure to testify; and (7) defendant was not denied right to public trial, under circumstances, by fact that law center, where defendant's trial was held, was locked during time jury was deliberating during punishment phase of trial.

Affirmed.

1. Criminal Law — 498

Statements, admissions, and confessions, given by defendant after he was informed of his rights several times and was told that only district attorney was empowered to offer immunity, were admissible as admissions or confessions voluntarily made to police officers and were not excludable as having been part of plea negotiations; defendant's expectation that his actions would lead to negotiation of plea bargain was not reasonable under circumstances surrounding giving of statements. U.S. C.A. Const.Amend. 5; 12 O.S.1981, § 2410.

2. Criminal Law — 781(1)

Under circumstances, defendant was not entitled to jury instruction that defendant's statements made in conjunction with plea negotiations were inadmissible. U.S. C.A. Const.Amend. 5; 12 O.S.1981, § 2410.

3. Criminal Law — 368.1

As general rule, evidence of other crimes is inadmissible; accused put on trial

Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Franks v. State*, 636 P.2d 381 (Okl.Cr.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Hager v. State*, 612 P.2d 1369 (Okl.Cr.1980).

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1. O.S. 21 §701.7 Murder in the first degree.

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

2. O.S. 21 §701.9 Punishment for murder.

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

3. O.S. 21 §701.10 Sentencing proceeding--Murder in the first degree

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

4. O.S. 21 §701.11 Instructions - Jury findings of aggravating circumstance.

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty. Laws 1976, 1st Ex.Sess., c.1, §6, eff. July 24, 1976. Laws 1981, c. 147 §1, eff. May 8, 1981.

6. O.S. 21 §701.13 Death Penalty - Review of sentence

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and
3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or
2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

7. 22 O.S. (1971) §1171 Doubt as to present sanity prior to calling of indictment or information for trial or preliminary hearing.

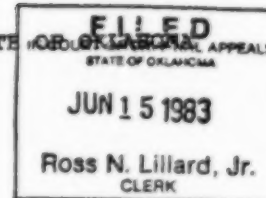
If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and prior to the calling of an indictment or information for trial or preliminary hearing, a doubt arises as to his present sanity, either such individual or the district attorney may make application to the District Court for an order committing such individual to a state hospital within the Department of Mental Health for observation and examination for a period not to exceed sixty (60) days. Provided, however, where an adequate examination can be had in the county where the charge is

pending, such examination shall be held in such county. Provided, however, the court may extend the sixty-day period where a need for such extension is shown. Any criminal proceedings against such individual shall be suspended pending the hearing of the application by the District Court. Laws 1963, c. 184, §1; Laws 1969, c. 288, §1. Emerg. eff. April 25, 1969.

8. 22 O.S. §1175.2 Application for determination of competency--Service--Notice--Suspension of criminal proceedings

A. No person shall be subject to any criminal procedures after he is determined to be incompetent except as provided in this act. The question of the incompetency of a person may be raised by the person, the defense attorney, or the district attorney, by an application for determination of competency. The application for determination of competency shall allege that the person is incompetent to undergo further proceedings, and shall state facts sufficient to raise a doubt as to the competency of the person. The court may, at any time, initiate a competency determination on its own motion, without an application, if the court has a doubt as to the competency of the person.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA



GLEN BURTON AKE, a/k/a
JOHNNY VANDENOVER,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

No. F-80-523

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING ISSUANCE OF MANDATE

NOW on this 15th day of June, 1983, after having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of June, 1983.

Herb J. Bussey
HERB J. BUSSEY, PRESIDING JUDGE
Tom R. Cornish
TOM R. CORNISH, JUDGE
Tom Brett
TOM BRETT, JUDGE

ATTEST:

Ross N. Lillard, Jr.
Clerk

Supreme Court of the United States

No. A-104

GLEN BURTON AKE,

Petitioner,

v.

OKLAHOMA

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

It Is ORDERED that the time for filing a petition for writ of certiorari in
the above-entitled cause be, and the same is hereby, extended to and including
September 13, 1983

/s/ Byron R. White

Associate Justice of the Supreme
Court of the United States

Dated this 12th

day of August, 1983

OFFICE OF THE
SUPERINTENDENT



STATE OF OKLAHOMA
DEPARTMENT OF MENTAL HEALTH

EASTERN STATE HOSPITAL

VINITA, OKLAHOMA

74301

22 May '80

ADDRESS ALL COMMUNICATIONS
CONCERNING PATIENTS TO THE
SUPERINTENDENT, GIVING THEIR
FULL NAME. FOR PROMPT REPLY
PLEASE ENCLOSE SELF-ADDRESSED
STAMPED ENVELOPE.

The Honorable Floyd L. Martin
Judge of the District Court
In and For Canadian County
ElReno, Oklahoma 73036

Dear Judge Martin:

Re: AKE, Glenn Burton #32391
Your Case No. PMH 80-8

The above-named was admitted to this hospital by your order for
care and treatment on April 10, 1980. Criminal charges are pending
against him.

As a result of a recent evaluation it is the opinion of our staff
that Mr. Ake has improved to where he would be able to adequately
consult with an attorney and he does have a rational as well as
actual understanding of the proceedings pending against him. He is
being maintained on the following medication: Thorazine 200 mgms.
t.i.d. We would of course recommend that he continue this
medication in order for his condition to remain stabilized.

We would further recommend that he be returned to the jurisdiction
of your court and we would appreciate your removing him from this
hospital at your earliest convenience.

Respectfully,

R. D. Garcia, M.D.
Chief Forensic Psychiatrist

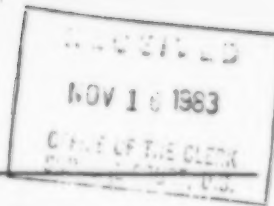
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cc: District Attorney, Canadian County, ElReno, Oklahoma
County Sheriff, Canadian County, ElReno, Oklahoma

This hospital complies with the Civil Rights Act of 1964.

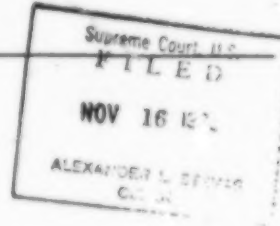
ORIGINAL

No. 83-5424



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982



GLEN BURTON AKE,
Petitioner,

-vs-

STATE OF OKLAHOMA,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, FEDERAL DIVISION
Counsel of Record

112 State Capitol Building
Oklahoma City, OK 73105
(405) 525-8550

ATTORNEYS FOR RESPONDENT

November, 1983

6782

QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the facts of this case, the Petitioner's constitutional rights were violated by the refusal of the trial court to have the Petitioner re-examined on the issue of whether he was insane at the time of the commission of the murders.

2. Whether the facts supports the Petitioner's allegation that the Petitioner was so heavily sedated at trial that he was unable to understand the nature of the proceedings and to assist his counsel in his defense.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASONS WHY THE WRIT SHOULD BE DENIED	6
I. WHERE THE PETITIONER GAVE A DETAILED FORTY-FOUR PAGE CONFESSION IN WHICH HE LUCIDLY SET FORTH THE EVENTS BEFORE, DURING AND SUBSEQUENT TO THE MURDER UNTIL HIS ARREST SIX WEEKS LATER AND OTHER FACTS SUPPORT HIS SANITY DURING THE TIME HE MURDERED THE DOUGLASSES, AND WHERE TWO PSYCHIATRISTS AND A PHYSICIAN-MEMBER OF THE SANITY COMMIS- SION TESTIFIED AS TO THE PETITIONER'S MENTAL CONDITION SUBSEQUENT TO HIS ARREST, THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A STATE TO PROVIDE ANOTHER PSYCHIATRIC EXAMINATION ON THE ISSUE OF THE PETITIONER'S MENTAL STATE AT THE TIME OF THE MURDER	6
II. WHERE THE PETITIONER'S ATTORNEYS DID NOT RAISE THE ISSUE OF THE PETITIONER BEING UNDER THE INFLUENCE OF THORAZINE TO THE POINT OF BEING UNABLE TO ASSIST HIS ATTORNEYS AT TRIAL AND WITHDREW A REQUEST FOR A STATUTORILY AUTHORIZED TRIAL BY JURY ON THE ISSUE OF PRESENT SANITY PRIOR TO THE CRIMINAL TRIAL, HE WAS NOT DENIED ANY CONSTITUTIONAL RIGHT	9
CONCLUSION	10

TABLE OF CASES

	<u>Page</u>
<u>Ake v. State</u> , 663 P.2d at 7 (Okla. Cr. 1983)	9
<u>Beck v. State</u> , 626 P.2d 327 (Okla. Cr. 1981)	10
<u>Cox v. State</u> , 644 P.2d 1077 (Okla. Cr. 1982)	10
<u>Drope v. Missouri</u> , 420 U.S. 162 (1975)	8
<u>Eads v. State</u> , 640 P.2d 1370 (Okla. Cr. 1982)	9
<u>Engle v. Isacc</u> , 456 U.S. 107 (1982)	9
<u>Estelle v. Williams</u> , 425 U.S. 501 (1976)	9
<u>Hawkins v. State</u> , 569 P.2d 490 (Okla. Cr. 1977)	9
<u>Hurley v. State</u> , 416 P.2d 967 (Okla. Cr. 1966)	9
<u>Irvin v. State</u> , 617 P.2d 588 (Okla. Cr. 1980)	8
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	7
<u>Payne v. Thompson</u> , 622 P.2d 254 (6th Cir. 1980)	8
<u>Pedrero v. Wainwright</u> , 590 P.2d 1383 (5th Cir. 1979)	8
<u>Strong v. State</u> , 547 P.2d 383 (Okla. Cr. 1976)	9
<u>United States ex rel. Smith v. Baldi</u> , 344 U.S. 561 (1953)	8

TABLE OF STATUTES

21 O.S.1971, § 652	4
21 O.S.Supp.1976, § 701.7	1,4
21 O.S.Supp.1976, § 701.9	1
21 O.S.Supp.1976, § 701.10	2
21 O.S.Supp.1976, § 701.11	2
21 O.S.Supp.1976, § 701.12	2
21 O.S.Supp.1976, § 701.13	3
22 O.S.1971, § 1161, et seq.	10
22 O.S.1981, § 1175.1	10

TABLE OF OTHER AUTHORITIES

28 U.S.C. § 1257(3)	1
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No. 83-5424

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

GLEN BURTON AKE,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent,

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma entered on April 12, 1983, and to which re-hearing was denied on June 15, 1983.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 663 P.2d 1 (Okla. Cr. 1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 21 O.S.Supp.1976, § 701.7, provided:

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

Title 21 O.S.Supp.1976, § 701.9, provided in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

"B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

Title 21 O.S.Supp.1976, § 701.10, provided as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11, provided as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is out-weighted by the finding of one or more mitigating circumstances the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12, provided as follows:

"Aggravating circumstances shall be:

- "1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
- "2. The defendant knowingly created a great risk of death to more than one person;
- "3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
- "4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13, provided as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside remand the case for modification of the sentence to imprisonment for life.

"P. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

Glen Burton Ake, a/k/a Johnny Vandenoever (hereinafter referred to as the "Petitioner") was convicted of two (2) counts of Murder in the First Degree, 21 O.S.Supp.1976, § 701.7, and two (2) counts of Shooting With Intent to Kill, 21 O.S.1971, § 652, in the District Court of Canadian County, State of Oklahoma.

The Petitioner was convicted by a jury which heard evidence in the second stage of the trial and found the existence of three (3) aggravating circumstances.¹ The Petitioner received a death sentence for each of the two murders for which he was convicted and a sentence of 500 years for each of the convictions for Shooting With Intent to Kill.

The facts which were presented to the jury reveal that on October 15, 1979, the Petitioner and his co-defendant, Steven Keith Hatch, quit their jobs on an oil field rig (Tr. 386), borrowed a car from a friend (Tr. 386) and went looking for location to burglarize (Tr. 537).

The Petitioner and Hatch finally decided upon a house, which was that of Reverend Richard Douglass, his wife Marilyn, and their two children, Brooks, age 16, and Leslie, age 12. The Douglasses had recently returned from Brazil where they had performed missionary work (Tr. 446).

The Petitioner obtained entry into the house under the guise of attempting to locate the residence of another person in the area (Tr. 430-432). While the Petitioner was in the house, Hatch entered with a shotgun and the Petitioner pulled out a handgun he had been concealing in his belt (Tr. 433-434; State's Exhibit No. 68, p. 15).

¹ The jury found that (1) the murder was especially heinous, atrocious or cruel; (2) the murders were committed to avoid or prevent a lawful arrest or prosecution; and (3) a probability existed that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society.

The Douglass family members were forced to lie on the living room floor and were bound with rope (Tr. 418-419). The Petitioner and Hatch then tore out the telephones and the Petitioner began searching the house for money. The Petitioner took the Douglasses' twelve-year-old daughter, Leslie, into her bedroom and forced her to undress (Tr. 419-420). He and Hatch then unsuccessfully attempted to rape the girl after putting suntan lotion on their penises as a lubricant (Tr. 420,425). Mrs. Douglass wept as she heard her daughter cry during the rape attempts (Tr. 438).

During most of this time Hatch guarded the Douglasses with the shotgun, threatening them if they moved (Tr. 438-439). The Petitioner and Leslie returned to the living room and she was also tied up (Tr. 439). The heads of Reverend Douglass, his wife, and the boy were covered (Tr. 421-438). The Petitioner remarked to the family that he liked to shoot people (Tr. 439-440) and then sent Hatch outside to start the car (Tr. 440).

The Petitioner then shot all four family members with the handgun (Tr. 441). Reverend Douglass and his wife died from the gunshot wounds as their son attempted to untie them after the Petitioner and Hatch left (Tr. 442). Partial strangulation was also a contributing cause of death to Reverend Douglas (Tr. 325, 332). The children eventually freed themselves and fled to a neighbor's house.

After the shooting the Petitioner and Hatch fled to Arkansas, Tennessee, Louisiana, Texas, California, Nevada, Utah, Wyoming and Colorado. While in Louisiana the Petitioner and Hatch showed some jewelry to a woman named Virginia Keef. The Petitioner told her that they had gotten it from some people in Oklahoma that they had killed (Tr. 456-457). Ms. Keef at one time wore some of this jewelry (Tr. 456), including Mrs. Douglass' wedding ring which was subsequently seized from Hatch when he was arrested (Tr. 411, 445-446, 460). Ms. Keef also observed a credit card belonging to Mrs. Douglass in the possession of the Petitioner and Hatch (Tr. 458) and used it herself (Tr. 459). Ms. Keef also testified that the Petitioner had telephoned his sister and that she had advised him that the Douglass children had survived (Tr. 457). Ms. Keef

stated that the Petitioner became "scared" upon learning this news (Tr. 457).

Petitioner and Hatch were arrested in Colorado on November 20, 1979. Upon being booked into the jail, the ring belonging to Mrs. Douglass was found on Hatch and a credit card belonging to Mrs. Douglass was found on the Petitioner.

Three days later the Petitioner gave a 44-page statement to law enforcement officials which was taped and subsequently reduced to writing and signed by the Petitioner (Tr. 552-525). This statement was introduced at trial as Exhibit No. 68 (Tr. 546-549). In this statement the Petitioner confessed to the shooting of the Douglass family.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

WHERE THE PETITIONER GAVE A DETAILED FORTY-FOUR PAGE CONFESSION IN WHICH HE LUCIDLY SET FORTH THE EVENTS BEFORE, DURING AND SUBSEQUENT TO THE MURDER UNTIL HIS ARREST SIX WEEKS LATER AND OTHER FACTS SUPPORT HIS SANITY DURING THE TIME HE MURDERED THE DOUGLASSES, AND WHERE TWO PSYCHIATRISTS AND A PHYSICIAN-MEMBER OF THE SANITY COMMISSION TESTIFIED AS TO THE PETITIONER'S MENTAL CONDITION SUBSEQUENT TO HIS ARREST, THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A STATE TO PROVIDE ANOTHER PSYCHIATRIC EXAMINATION ON THE ISSUE OF THE PETITIONER'S MENTAL STATE AT THE TIME OF THE MURDER.

The Petitioner claims in essence that the United States Constitution required the State to provide the Petitioner with a psychiatric examination which would pertain to the Petitioner's mental state at the time of the murder of Reverend and Mrs. Douglass.

The State contends that this present case does not present facts which compel such a result. At trial the Petitioner was allowed to call as witnesses two psychiatrists (Tr. 554, 586) and a physician (who was a member of the county sanity commission--Tr. 572) who had examined the Petitioner in order to determine his ability to stand trial. These doctors were permitted to testify that they believed him to be mentally ill at the time they examined him.² One of the psychiatrists, Dr. Garcia, examined

² See testimony of Dr. Allen (Tr. 560-561); Dr. Enos (Tr. 573); Dr. Garcia (Tr. 589).

the petitioner for an extended period of time--March 6, 1980, until April 6, 1980, and April 10, 1980, to June 9, 1980. The Petitioner was given the full benefit of their testimony and therefore he cannot contend that mitigating evidence was kept from the jury. Cf., Lockett v. Ohio, 438 U.S. 586 (1978).

The Petitioner asserts that the Constitution requires that further evaluation be made to give the Petitioner the benefit of psychiatric opinion of his mental status on the day he murdered Reverend and Mrs. Douglass, October 15, 1979, some four months earlier.

It is the position of the State that the record does not support his contention as there is nothing to demonstrate that the Petitioner was insane at that time. Dr. Garcia testified that the Petitioner had no previous history of mental illness (Tr. 599). Three days after his arrest the Petitioner summoned the Sheriff of Canadian County to the jail and gave law enforcement officers a detailed confession which was reduced to writing. Three days later it was signed by the Petitioner after he had made corrections to the statement (Tr. 547-548; State's Exhibit No. 68, attached hereto as Appendix "1").³

Other evidence supports the competency of the Petitioner at the time he murdered Reverend and Mrs. Douglass. The Petitioner and Hatch fled the scene and traveled from state to state, which the Petitioner lucidly sets forth in his confession. Details of that journey are related in their entirety. While drug and alcohol use are mentioned, no statement is made which reflects upon his mental competency.

Furthermore, testimony at trial revealed that, when in Louisiana, the Petitioner made a statement to Virginia Keef that he had obtained the jewelry that he and Hatch showed her from some people in Oklahoma they had killed. According to Ms. Keef, the Petitioner also telephoned his sister and became "scared" when told that "the two kids

³ Certain blank pages and spaces appear throughout the statement due to the fact that part of it was excised to delete references to other crimes (Tr. 479-482, 502).

had lived" (Tr. 457). Furthermore, when arrested in Colorado, the Petitioner had the credit card of Mrs. Douglass in his possession (Tr. 411).

Agent Shields of the Oklahoma State Bureau of Investigation testified that when the Petitioner gave his statement he was very calm and communicated well (Tr. 523). Sheriff Stedman, who was also present when the confession was given, testified that the Petitioner was responsive, coherent and alert (Tr. 536).

In the present case the Petitioner was certified as competent to stand trial (A. 2--Letter of Dr. Garcia May 22, 1980). Therefore, the Petitioner cannot claim that he was denied due process for this reason. See, Drope v. Missouri, 420 U.S. 162 (1975). The Petitioner's attorney did not object to this finding and did not assert this as a ground for appeal or as a part of his Petition to this Court, other than to complain of his appearance at trial due to the prescription for Thorazine (Petition, pp 18-20). Most importantly, on the day of trial, the Petitioner's attorneys withdrew their Motion for Sanity Trial to Determine Present Sanity (Tr. 3-4; A. 3 herein).

There is presently no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense. United States ex rel. Smith v. Baldi, 344 U.S. 561, 568 (1953). Under Oklahoma law a defendant is not entitled to the services of a court-appointed psychiatrist or the funds to retain one. Irvin v. State, 617 P.2d 588, 594-95 (Okla.Cr. 1980).

In Pedrero v. Wainwright, 590 P.2d 1383 (5th Cir. 1979), the Fifth Circuit noted that in that Circuit in a state case a defendant's sanity at the time of the offense must be "seriously in issue" or there must be "reasonable ground to doubt" his sanity. 590 P.2d at 1391.

In Payne v. Thompson, 622 P.2d 254, 255 (6th Cir. 1980), it was held, "[n]or can we find a federal constitutional violation in the state trial court's refusal to provide expert witness and psychiatric examination by witness of his own choosing."

Furthermore, the Oklahoma Court of Criminal Appeals in the present case held that this argument was waived in that it was not preserved in the Petitioner's motion for new trial. See, 663

P.2d at 6. An examination of the Motion for New Trial bears out this fact (A. 4 herein). In Oklahoma, only assignments of error presented in the motion for new trial will be considered on appeal, unless the error complained of is fundamental. Hawkins v. State, 569 P.2d 490, 493 (Okla.Cr. 1977). This is a long-standing rule of criminal procedure in Oklahoma. See, Eads v. State, 640 P.2d 1370, 1371 (Okla.Cr. 1982); Strong v. State, 547 P.2d 383, 385-86 (Okla.Cr. 1976); Hurley v. State, 416 P.2d 967, 971-72 (Okla.Cr. 1966).

Failure to comply with a state procedural rule normally bars federal review of an alleged constitutional error. Engle v. Isaac, 456 U.S. 107 (1982). See also, Estelle v. Williams, 425 U.S. 501, 513-16 (1976) (Powell, J. concurring) (failure to object to appearing in prison garb should act as waiver of constitutional right).

In view of the fact that there was no showing that the Petitioner was insane at the time of the commission of the murder, and because the Petitioner failed to raise this issue in his Motion for New Trial, certiorari should not be granted to review this issue.

II.

WHERE THE PETITIONER'S ATTORNEYS DID NOT RAISE THE ISSUE OF THE PETITIONER BEING UNDER THE INFLUENCE OF THORAZINE TO THE POINT OF BEING UNABLE TO ASSIST HIS ATTORNEYS AT TRIAL AND WITHDREW A REQUEST FOR A STATUTORILY AUTHORIZED TRIAL BY JURY ON THE ISSUE OF PRESENT SANITY PRIOR TO THE CRIMINAL TRIAL, HE WAS NOT DENIED ANY CONSTITUTIONAL RIGHT.

The Petitioner next contends that he was denied the right to a fair trial due to the Thorazine which was prescribed for him by Dr. Garcia in a letter to the Court advising that the Petitioner was now competent to stand trial (See A. 3).

The Oklahoma Court of Criminal Appeals noted that, upon the Petitioner's return from Eastern State Hospital where he had undergone observation, the Petitioner's attorneys withdrew their motion for trial on present sanity. See, Ake v. State, supra, 663 P.2d at 7. Indeed, the trial transcript reflects that, on the day of the Petitioner's jury trial, the Petitioner's two attorneys withdrew their Motion for Sanity Trial to Determine Present Sanity (Tr. 3-4, A. 3 herein).

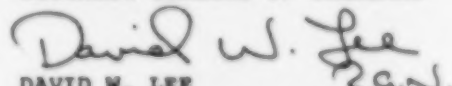
In Oklahoma a defendant in a criminal case has the right to a jury trial on the issue of whether he is competent to stand trial. 22 O.S.1971, § 1161 et. seq. (Now 22 O.S.1981 § 1175.1 et. seq.) Cox v. State, 644 P.2d 1077, 1078 (Okla.Cr. 1982); Beck v. State, 626 P.2d 327 (Okla.Cr. 1981). Since the Petitioner withdrew the motion for such determination and raised this issue only in closing argument, the Petitioner's contention in this regard is meritless.

CONCLUSION

For the reasons stated, the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

APPENDIX - 1 STATEMENT OF THE PETITIONER GIVEN ON
NOVEMBER 23, 1979.

jb

CANADIAN COUNTY

SWORN AFFIDAVIT

PAGE # 1

STATEMENT OF GLENN BURTON AKE

Q: This will be an interview with Glenn Burton Ake at the Canadian County Sheriff's Office in the Sheriff's Office in El Reno, Oklahoma. My name is D.L. Stedman, Sheriff of Canadian County. Present with me are Agent Greg Shields, OSBI and Mr. Glenn Burton Ake. Glen what is your date of birth?

A: Nineth month, the 8th day of 55.

Q: (DS) Is Glen Burton Ake your true and correct name?

A: Yes it is.

Q: (DS) Do you go by any aliases?

A: Yes I do.

Q: Tell those to me, would you?

A: John Vandover, its not Johnny like everybody has been saying, Skip Thompson.

Q: (DS) Spell Vandover for me?

A: V-A-N-D-E-W-O-V-E-R. All one name, no hyphens. The other name I went under was Skip Thompson and I went under that in Casper, Wyoming and Shoshoni, Wyoming, and ~~Skip Thompson~~. I went under ~~Skip Thompson~~ that in Louisiana, New Orleans when I was working for Jack Thompson Shows. Billy Williams I used one time for one day just passing through. The people that I stayed at their house ask my name and that's what I told them. That's all my aliases.

Q: (DS) Okay, Glenn, are you aware that this conversation is being taped?

A: Yes I am.

Q: (DS) Have you agreed to it?

A: Yes I have.

Q: (DS) Okay, let me read you your rights under the Miranda Warning. You have a right to remain silent. Any statements that you make can and will be used in evidence against you. You have a right to consult with and have present prior to and during interrogation an attorney either retained by you or appointed. If you cannot afford an attorney one will be appointed for you prior to any questioning if you so desire. You may stop talking at any time you desire. Do you understand each of these rights that I have explained to you?

A: Yes sir.

Q: (DS) Having these rights in mind do you wish to talk with us now?

A: Yes sir.

Q: (DS) Okay, Glenn in your own words, why don't you start back on October 15th and tell us what happened that day and during the previous days until you were arrested in Colorado.

A: Alright, a, there was one other question that I wanted to ask you. Anyway it started out that morning. I got up and I found out that the girl I was living with, Theresa Colley, was a going out on me, she stayed out all night that night and the night before. And I woke up and I was sort of pissed off. I started drinking before I went to work.

Q: (DS) And this was all on Monday the 15th of October?

A: This was all on Monday. I woke up about 8 o'clock in the morning and started this. I started drinking. At 2 o'clock in the afternoon my crew showed up and she wasn't there still. So I went on ahead and went to work, continued to drink all the way there too.



CANADIAN COUNTY

SWORN AFFIDAVIT

PAGE # 2

STATEMENT OF GLENN BURTON AKE

A: Got there and showed up for work

So we decided to get rid of my job, so I left my derick hand there, I was short-handed already, left my derick hand to drill, cause the tool pusher said that he could have a drilling job next if I wanted to get rid of him. So me and Steve borrowed Dewayne's car, Dewayne Lucas, which was my derick hand and he loaned it to us and so we went ahead and went back to Enid, got back to Enid and we was around the house and she still hadn't come around. I tried to find her and I finally located her and I couldn't get in touch with her, she wouldn't talk to me, so she there. So I went ahead and moved all my furniture out of the house, everything I had, called my dad, he called my Grandfather, they both showed up over there, we moved the whole house out. We got the house moved out, I didn't know what I was going to do, I started looking for her, couldn't find her, finally we just took off. We were going to take the car back out, we had Steve's car there, Steve has a car in Enid, had one, still there probably, somewhere. And we took off and we went out towards the rig, went by the rig, we didn't go exactly by it, went around the section line by it. Went over to this other place, we looked at it, didn't look very promising so we just went on by it. At that time I knew that I couldn't go back by the rig so we just decided to head on down the road and get out of there, we had a little bit of money on us. So we went on, we headed on down the road, I forget which highway it was, we cut over to Hennessey and started coming south, bought a bunch more booze, whiskey and stuff, started drinking. We got down the highway, it was dark time, I don't know what time it was exactly and we decided to start driving the section lines to see if we could get us, pick us up some more money by doing a burglary or something, you know. We drove up to this one house and we didn't like it so we drove out. We went into two or three houses like that and finally we came to this one house where Mr. Douglass lives. We pulled into the driveway and there was about 6 or 7 Doberman Pinchers met us at the driveway so I went up and made a phone call, played like I was going to make a phone call, went up to the door and she let us in. Well she..they didn't let us in the dogs stopped us and they came outside and met us and they let us come in to make a phone call. I said I forgot the phone number in the car and so I went back to the car to get it, I was pretty scared. I never done...all we was going to do was the burglary but the people was home. So we...I went back up to the house and played like I was going to make a phone call and told Steve to meet me coming in the door, come on in the door. Steve came up to the door and I pulled out my gun and I said alright, everybody in the living room on the floor. Everybody went in the livingroom on the floor. We continued to go on through the house to burglarize the house with the people there and all, that was all we was going to do is burglarize the house. So we came back in the livingroom, we stayed there for about 30 minutes, I guess, searching the place, we had one of the kids show us around to every room, where all the money was, all the little cups of money and everything, trying to get some money. So Steve goes through their wallets, I guess, doesn't find nothing but a credit of Mrs. Douglass. They had bunches of credit cards but nothing was taken except for one Visa card from Mrs. Douglass. Left all his credit cards and everything so people would think nobody took credit cards. So we were all in the living room and it was about time to leave and I told Steve to go outside and get in the car and turn it around and get it ready to go, get it running and ready to go. Steve goes outside and hops in the car and he warns me, he says, "don't do nothing drastic before we leave." I tell him, I say, "don't worry I ain't, don't worry ain't." Finally I got him talked into leaving outside, going outside. He walks outside get in the car turns it around, starts it up. And I stands by the end of the couch and I unloaded a .357 magnum loaded with .38 wad cutters on these people. I continue to run out the door and the dogs were all barking at me so I slowed down to a walk, walked out the door, I drove off, drove off. Steve asked me what I done and he told me I should of never done nothing like that. So we go on down the road to Arkansas, Ft. Smith, Arkansas. So we decided to get rid of that car that Dewayne

BEST AVAILABLE COPY

STATEMENT OF GLENN BURTON AKE

A: Lucas loaned us so we parked it in the back of this motel where we stayed that night. We parked it behind it and left it there and hopped on a bus to Memphis, Tennessee and we decided that we would make a switch in buses and confuse everybody. We switched buses and we went to Memphis and we stayed there at the Ramada Inn for two days where we got ripped out for \$800 but we still had \$900 left. We had \$1700 when we left, before we done any burglaries, but we knew that wasn't going to last

Never-

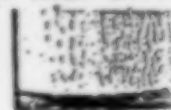
the less, we should of never done any of those serious crimes. We went on down to New Orleans, we got that job, we got that job and we went to work and we worked there for about a week or so and I met this girl, Ginger, I don't know her last name at all now. And we picked her up, Steve told me not to pick her up, not to take her with us but I wouldn't listen to him cause I knew her before, when we lived in Shoshoni with her and she knew me as Skip, that's what everybody while the whole journey was on, was Skip. So we went ahead and worked awhile and she was going to move on the lot with me and they fired me for letting her move on the lot. So we went ahead and left there headed towards Texas on the bus and we got to Texas. Can I stop for a moment?

Q: (DS) Yes.

A: When we were headed through Texas, we started headed into Texas, we were on the bus we didn't have enough money to ride very far and we were going to stop at that lake, right this, right that side of Texas, still in Louisiana.

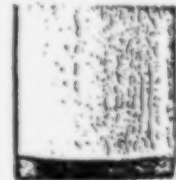
Q: (DS) Lake Charles?

A: Lake Charles. Okay we met this guy on the bus and he said he could put us up for the night if we made it to Orange, Texas. The next town away. We had just enough money to get there, we done blow all our money on our travels. So we went ahead and we went to Texas, Orange, Texas, we stayed there the night this man had a wad of money on him you wouldn't believe, about \$2800-\$3000, but he was being real good to us by giving us a place to stay and everything and Steve wanted to go ahead and burglarize it but we didn't. I told him no and I was the main whole thing the whole cappers was my brain whatever I told Steve we didn't do, we didn't do it. So we went ahead and left the next morning with just a few dollars in our pockets and he gave us a ride....well we stayed there two days, yeh, two days, and we continued on and he gave us a ride, he wanted to get rid of us out of his house I guess, cause we had already imposed on him two days. He gave us a ride it was about 40 miles from there about 50 miles or something like that, where he dropped us off on the road by this park, stopped by this park, went across the street, he dropped us off headed north towards 80. We didn't want to head north



STATEMENT OF GLENN BURTON AKE

We was headed north there so we could just go south and cut off on 10. We went down that way, paying cash for all the gas. No one could trace us with the credit card. We get down south on 10 comes on across into New Mexico into Arizona, into Nevada, go up through Nevada, get into the northern part of Nevada and just crossed the border into California and we're low on money. So we head south again cause there was no cut over from where we were at. So we had to go all the way down south to Barstow, towards Barstow California, where I had a Gulf card from that one guy in Texas. I used it in one place. We went on from there, we went on down south, started using that Visa card, Ginger did. Started using that Visa card and went all the way across to California go up through my home town, up through my home town, on through there, went north of there and started headed east again, figured we would throw the patrol again, by heading east. Changed plates three times already by that time, on that car. Then we picked up another set of California plates on that last venture east. So we threw them off cause we didn't want to use that Visa card in the same place all the time. We started headed east and got into Nevada and started blowing all our money. Well I gave Steve the money and he goods with money and he can handle money, I can't, I blow it too much. I gave him \$150 and I kept \$300. We were headed through there and we got to a place called Battle Mountain and we was gambling in the Casino, he was playing 21 and I was standing at the bar, drinking whiskey. Every time we done this, I had to be all fucked up, everytime I done any shooting I was all fucked up on whiskey. Whiskey makes me nutty, anybody will tell you that, anybody, that's the only time I'm ever rowdy whenever I drink whiskey. We stopped there started drinking Whiskey and everything and these guys invited us over for dinner, these young people, they were all bikers and stuff. The kind of people I run around with. I had a leather vest on at the time, levis, Harley Davidson belt buckle, boots, Harley Davidson hat and everything. So they invited us over thinking we were bikers too, you know, So we went over there and we partied there for three days, hard, \$300 worth of whiskey, half gallons, gallons of whiskey, wine, beer, we headed out of there thinking we were getting hot cause the cops were watching us over very close. We headed out of there and headed into Utah on Visa, everything, all our travels were on Visa. We went all over Utah with that Visa card. She just sign the shit right out of it. Spend 3 or 4 thousand dollars on that Visa card in Utah alone. Whatever she wanted to buy and whateverbody wanted to buy, we bought with that Visa card, we got com checks with that Visa card and everything. She always kept saying com checks, com checks, that's all she got, she got Visa quick, she got Visa power



STATEMENT OF GLENN BURTON AKE

A: or what ever you want to call it. We headed out of Utah, headed north up to Wyoming. Stayed in Rock Springs one night and headed on down to Baggs, got to Baggs and I went over and seen a friend of mine I wanted to see. I was going to work on a rig. Was going to keep cool, lay low and do nothing else wrong cause I didn't do nothing wrong in that state. And here we get into an argument that night at the bar but we wasn't bar hopping. We was drinking all day before then. And we left that night, well we got into an argument and everything in the bar and I wanted to knock the shit out of her but I didn't, didn't ever hurt her, so I busted her glasses, that's just as bad as hurting her cause she can't hardly see very good. So she called the law on me, I guess, told them where I had my 7 mm rifle at. The law, they just went over and got that. And I went over where the law was at, I didn't know they were there, to get that 7 mm rifle. And the laws was standing out on the road around the corner of the block. So when they seen us in there they come around. When they come around they said, "Hold it you by the car." And I was outside the car, they couldn't see Steve inside the car. So I took off running on foot. Ran for a little bit around the trailer, they still were standing over there. So I ran back to the car, hopped in the car, backed it out of the driveway and takes off and that's when I headed south out of Baggs three miles from the border. I comes down south about 18 miles, going about 130 miles an hour on black ice trying to lose them. I couldn't lose them very easy, there lights were back behind about a mile an a half or two miles. So I flipped a huey, slowed down enough where I could flip a huey and I come slidding in the middle of the road like this here, making a 180. I start coming back, I get back up there and we pass them and he sees what I done and he was already going fast as hell you know, and he couldn't stop and I whipped off on this other road which I knew, cause of an oil field up there that I worked in. Whipped off it and went on down the road quite a ways, went off this one road, parked, turned off all the lights and everything and watched him come back and go right on by and he kept on going until his lights were out of sight. We turned on and came back down that one road where we got caught at. That brings us up to date.

Q: (DS) Okay, Glenn, now that we've gone through that with you in a narrative form telling us, lets go back and start on October 15, which was a Monday. What did you do the first thing on October 15?

A: Woke up and started looking for Theresa.

Q: (DS) Who is Theresa?

A: Theresa Cooley was the one that I was living with up there in Enid.

Q: (DS) Is that Steve Hatch's sister?

A: Theresa Cooley's maiden name is Theresa Hatch, yes it is.

Q: (DS) Okay, and why was you looking for her?

A: Cause I was living with her and she hadn't been home in two nights in a row and I was mad at her and that why I started drinking, and smoking pot.

Q: (GS) Had you had a fight with Theresa the night before she left?

A: No. That's what I couldn't understand, I gave her my whole check and everything. Everything, I just come home....I'd work come home and give her my money, taking care of it, buy the kids what they need everything. I couldn't understand it. That's what I couldn't understand.

Q: (DS) After you couldn't find her, what did you do then?

A: We started drinking. I shot up about half a gram of cocaine, at one time, started smoking pot, looking for her.

STATEMENT OF STEVEN KEITH HATCH

Q: (DS) What time of day was that?

A: 9 o'clock in the morning, 10 o'clock in the morning, somewhere around in there.

Q: (DS) Okay, and how long did you look for her?

A: About an hour, that's all I could drive.

Q: (DS) Were you by yourself?

A: No, Steve was with me.

Q: (DS) Steve Hatch?

A: Steve Hatch, well he was with me the last half hour, the first half hour he was gone, I think he was talking to her.

Q: (DS) Okay, this puts us up to about 10 o'clock, where did you... what did you do then?

A: I just kept looking for her, drinking and smoking dope and shooting drugs.

Q: (GS) Where were you at that time?

A: In my house.

Q: (GS) And where was that?

A: 2112 West Pine, Enid, Oklahoma.

Q: (DS) Okay, what time did you leave the house then?

A: About 2 o'clock.

Q: (DS) Who did you leave with?

A: My derick hand came to pick us up.

Q: Who is he? (DS)

A: Dewayne Lucas.

Q: (DS) Okay, your derick hand?

A: He was my derick hand, yes.

Q: (DS) Okay, what did you do for a living.

A: I was a driller on a oil rig, working for Sarah Drilling Company.

Q: (DS) Where at.

A: Hennessey Highway and the Drummond Highway, right at that corner.

Q: (DS) That would be west of Hennessey?

A: West of Hennessey, south of Drummond, all the way to the Hennessey highway.

Q: (DS) How did you leave?

A: In his car, he was driving, I couldn't drive.

Q: (DS) Was anyone else with you?

A: Steve Hatch was.

Q: (DS) Okay, what kind of car did Dewayne Lucas have?

A: 64 Malibu.

Q: (DS) Do you remember the color?

A: It was yellow with alot of primer spots on it. Banana yellow, light yellow, lighter than banana, like a real faded out banana.

Q: (DS) And you said this was about 2 o'clock?

A: About 2:30 or something like that.

Q: (DS) Where did you go?

A: Went to the rig.

Q: (DS) Okay, did you do anything on the way to the rig?

A: Okay, drank beer and whiskey. Soon as we got to the rig, I could make it up to the dog house and change clothes, that's all that I could do.

that's when we borrowed the car and left.

Q: (DS) Glenn do you, are you an outdoors man?

A: Yes I am

Q: (DS) Do you like guns and hunt quite abit?

A: No.

Q: (DS) You don't hunt much?

A: I've never went hunting at all.

Q: (DS) Is that right?

A: I lugged guns while I was in the army. I was an expert. I like tearing them apart and working on them and putting them back together.

Q: (DS) Did you own a gun at that time?

A: That day, yes I did.

Q: (DS) What was it?

A: .357 magnum.

Q: (DS) Where was that gun at that time?

A: It was in the car, in my lunch box. I was going to take it out to the rig and practice shot with it.

Q: Did you?

A: No.. I went out and bought a whole box of shells but I never shot them.

Q: (GS) When did you buy shells?

A: The day before, the 14th.

Q: (GS) Where did you buy these shells?

A: K-Mart, in Enid, Oklahoma. They had no .357 rounds at all.

Q: (GS) What type shells did you buy?

A: .38 wad cutters. .38 Special Wad cutters. They said they would shoot through the gun but they would leave a lead build up so I bought a wire brush and a cleaner so I could clean the barrel every time I fired 6 shots through it, which I did. I practice shot with it quite a few times before we went out that night?

(GS) Q: Where did you practice shooting?

A: I practice shooting at the reserve pits. Cross reserve pits, thats an oil rig about ...-

(end of tape)

Q: (DS) This will be the beginning of side two.

STATEMENT OF GLENN BURTON AKE

A: I was practice shooting, I practiced about 12 rounds at the Cross reserve pit. About 150 yards and I could hit a coke bottle with it at that range. Pretty damn good.

Q: (GS) Where was this reserve pit located?

A: The one we practiced on. It was back towards Drummond and behind Waukomis. It was back northwest, where a rig had just moved off location. There was nobody on it. I went in there and I was just practice shooting. There was no houses around in site or nothing.

Q: (DS) Was this that day?

A: That day.

Q: (DS) What were you shooting at?

A: Coke bottles, coke cans.

Q: (GS) Who was present with you?

A: Me and Steve, period.

Q: (DS) Was this before you went to work?

A: No this was after we went to work and after we took off. It was before I moved. We had practiced about 15 shots before we went home, before I moved.

Q: (DS) Did you do any practicing before you went to work when Dwayne was with you?

A: Nope. I showed him the gun and everything but we never shot it. Cause I just had bought it?

Q: (GS) Where did you buy the gun?

A: I bought it off another guy. I was drinking in a bar in ^{MOA.} Holman and that guy was talking about him having a bunch of guns and stuff and he said he had a .357 for sale and I told him I would buy it and we went out to his house that night and we were drunk and I bought it.

Q: (DS) When was this?

A: Around the 13th.

Q: (GS) Do you know his name?

A: No I don't.

Q: (DS) What kind of gun was it?

A: .357 magnum, Ruger.

Q: (DS) Ruger, .357. Can you describe the gun to us?

A: Just a regular .357, blue on one side was tarnished.

Q: (DS) It was blue steel?

A: It was blue steel, yes, but the blue on it on one side was bad.

Q: (DS) How long a barrel did it have?

A: Maybe about 3", 3 1/2", I don't know exactly.

Q: (DS) How much did you give the man for the gun?

A: Gave him \$125. I sold it for \$50 when I sold it.

Q: (GS) Where did you sell it at?

A: Louisiana.

STATEMENT OF GLENN BURTON AKE

Q: (CS) Who did you sell the gun to?

A: A guy who picked us up hitch hiking. I don't know who he is, what, and where. I know where he is located now, 5 miles south of New Orleans somewhere.

Q: (CS) How could you locate him?

A: Couldn't. Not now.

Q: (CS) Is this where the man picked you up?

A: No, he picked us up down by, Noma, Louisiana, south of New Orleans about 40 miles or so. We were hitch hiking. We didn't have no money to catch a bus. So I sold him that gun so we could have some money. I seen a car/along the way back towards where he was taking us and nival

I had him drop us off so we went and got a job right quick cause I knew how to talk carney talk. I knew it when I was 14, 13 years old as a run away from home.

Q: (DS) Okay, lets back up to on your way to work. You were telling me you did not do any practicing on your way to work that day.

A: Nope.

Q: (DS) Okay, what time did you get to work?

A: 5 minutes to 3, ^{right} on relief.

Q: (DS) And that's when you relieved the day light tower?

A: That's when we relived, every day, between a quarter till and 3 o'clock on the money, we relieved them everyday. I've always been on time to work and everything, never been late, always showed up 7 day a week job and all.

Q: (CS) And how long were you at the rig?

A: About an hour, I guess, if that long, I don't know how long, I know it wasn't over an hour.

Q: (DS) This was the 15th of October, was that pay day?

A: I think we got paid the day before. No we got paid Friday and that was Monday. We got paid on Friday before then. They still owe me a weeks check. I'd like to get that so I could give it to my parents too.

Q: (DS) When you left the rig. How did you leave?

A: By Dwayne Lucas' car, he loaned it to us.

Q: (DS) And who left with you?

A: Me and Steve.

Q: (DS) What did you tell Dwayne Lucas that you were going to do?

STATEMENT OF GLENN BURTON AKE

A: Take the car to Enid and that we would bring the car back to him. Told him that I was going to move and get the hell out of Dodge.

Q: (DS) And you took Dwayne's car and went to Enid?
(CS) What did you do when you first got back to Enid?

A: I started looking for her and I couldn't find her tause I 'new she had a key to the place. Then I called my parents to move and we got everything moved out within 45 minutes. We moved kitchen set all the utensils, the living room set, couches, TV's stereos, hanging lamps, everything, bedroom set, bunk beds and everything out of the bathroom. That's everyting I own.

Q: (DS) And who took that, your parents?

A: Its at my parents house now. I gave it to them to take there.

Q: (DS) Okay, last night, you made a phone call to your mother. Is that stuff the stuff that you told her to sell?

A: Yes. And I'd like to call her back and tell her not to sell it. Cause I'm doing this and I'd like to give it to my nephew when he gets older, cause it was plush stuff.

Q: (DS) Okay, after you parents left with the stuff and was moved over to there house, what did you and Steve do?

A: We decided to take the car back out there and on the way back out there we decided that we didn't have no transportation so we decided to take the car to Arkansas until we could get on the bus, which we had money.

Q: (CS) Did you have the money in your pocket?

A: Yes I had money in my pocket. I had that whole check, cause I never gave her that check cause I found out she was going out on me on Thursday.

Q: (DS) Did you have any other money on you, other than your check.

A: No.

Q: (DS) Did Steve have any other money on him other than what he got from his check?

A: No. Not at that time.

Q: (DS) Okay, you did not go write a check or go to the bank and get any money or anything?

A: Oh, yes we did, we went and drawed out our savings accounts.

Q: (DS) Where was that at?

A: That was at Northwest Enid, Northwest Bank of Enid.

Q: (DS) How much money did you get there, Glenn?

A: Hundred dollars, I think, or something like that, I don't know what it was, I forget.

Q: (DS) Did Steve get any money there?

A: He got his money he had there too.

Q: (DS) Do you know how much that is?

A: I think it was around the same amount I had, it might have been

STATEMENT OF GLENN BURTON AKE

A: 50 apiece, I don't know. It was either 50 apiece or 100 apiece we had in there.

Q: (DS) Did you get that money out of a checking account or a savings account?

A: Savings account under our aliases.

Q: (DS) And what was that?

A: John Vandover and Steve Lisenbee. That was John Vandover and not Johnny. I never have used Johnny.

Q: (DS) Okay, when you started to leave Enid, did you do anything in Enid before you left?

A: Looked for her and that was it. That's all we did man.

Q: (CS) What time did you leave Enid?

A: I don't know it was in the afternoon sometime. Evening around 5 o'clock, 5:30 maybe 6. Somewhere around there.

Q: (DS) Okay, where did you go from there?

A: Headed towards the rig.

Q: (DS) The rig that you worked on?

A: Right to take his car back there but we decided right at the last moment that we weren't going to take his car back.

STATEMENT OF GLENN BURTON AKE

STATEMENT OF GLENN BURTON AKE

Q: (GS) After you left Hennessey what is the first town that you come to.

A: I don't know, to tell you the truth, I was drunk and I don't know where we were at. I wasn't driving, Steve was.

Q: (GS) Do you remember stopping any place?

A: We stopped in Hennessey to get some beer, south of Hennessey to get some beer to drink. That's it. Love's Country Store or what ever it was, south of Hennessey. Stopped there and got some beer, we had three cases of beer in the back.

Q: Okay, were you on Highway 81 at this time.

A: I think so, I'm not for sure.

Q: (DS) Where did you go from there Glenn?

A: South to these other peoples house. We went around looking for other places but nothing looked any good.

Q: (DS) Okay, if you were going south on 81 did you go through Kingfisher?

A: I guess so.

Q: (DS) Did you stop in Kingfisher?

A: Maybe to get gas. No we gased up at Love's Country Store. We didn't stop in Kingfisher, I don't think. I don't know, I was wiped out.

Q: (DS) Did you a.....

A: All I remember are the high points of that night.

Q: (DS) Do you remember going through Okarche?

A: When we went through, I slept most of the time except when we were looking at houses. I was getting ready to look at this house and



STATEMENT OF GLENN BURTON AKE

A: I'd say, "no, no, no". And finally we came to that one house and he kept bugging me and bugging me to look at houses and I finally said, "pull in this one."

Q: (DS) Who kept bugging you, Steve?

A: Yeh. He kept looking at the ones with no lights on and everything.

Q: (GS) Did this house have lights on?

A: Yeh, the one I said pull in to, sure did, had a who's family in it. The Douglass family.

Q: (DS) Could you tell us where that house is?

A: To tell you the truth, I can't, can't tell you how to get to it or nothing. All I know is that it's not far from the highway.

Q: (DS) How far from the highway?

A: I don't know but its' not very far cause it didn't take us very long to get back on the highway.

Q: (GS) What would you guess it would be?

A: Quarter of a mile, not very far. I don't know for sure but I don't think it was very far from the highway.

Q: (DS) Is it on a country road, section line?

A: Dirt road, yeh. Section line.

Q: (DS) Which side of the section line is it on?

A: If you're headed east I think, its on the right hand side. On the south side of the road. I'm I right, south side of the road, if you're headed..., south side of the section line, I'm pretty sure.

Q: (DS) Okay, did you pull in the driveway?

A: Cause I don't know which way we were headed. I think we were headed, east or west when we pulled in. Yeh, we pulled right in the driveway and I told Steve, "pull right in the driveway, pull right up like you're going to make a phone call."

Q: (DS) How long was the driveway?

A: Pretty good driveway, I guess, I think.

Q: (DS) Straight or curved?

A: I think, it was straight with a small curve at the end. I think.

Q: (DS) Can you describe the house to us?

A: No, I sure can't. All I seen was 6 Doberman Pinchers or so.

Q: (DS) Was it frame, brick, one story, two story?

A: I think it was one story, with a part with two story in it. In fact, yeh, I know it had to be part of a two story, it had to be, because I remember going down stairs and there was a little room there and that was it. Downstairs, I think.

Q: (DS) Okay when you pulled up into the driveway and parked, where did you park?

A: Right in front of the garage door.

Q: (GS) Was there any other vehicles?

A: Yeh.

STATEMENT OF GLENN BURTON AKE

Q: (GS) Could you describe them?

A: One was in the drive, I don't know what they was, there was two vehicles there.

Q: (DS) Do you know what kind they were?

A: I don't know, I was pretty messed up whenever I was going in there, I was scared off my ass. Cause I never done nothing like that with people home, no burglaries, I didn't know what I was going to do.

Q: (DS) Who got out of the car first?

A: Me. I told Steve to get in it.

Q: (DS) And what did you do when you got out of the car?

A: I went up to make a phone call. When I seen they were going to let me make a phone call I told them I had to go back out to the car and get the number.

Q: (DS) Was the dogs barking?

A: Severly.

Q: (GS) Who answered the door?

A: A, I never went to the door, I went by the corner of the garage and I stopped and a girl and a boy came out..

Q: (GS) What did you say to the girl and boy?

A: I said, "We need to make a phone call; we're lost. I'm trying to find a friend of mine."

Q: (GS) Who did you ask for?

A: Nobody. I don't remember who I asked for.

Q: (GS) Did you ask for anybody in particular?

A: Yeah, I asked for some Joe Blow or something, you know, some off the wall name. Just the first two names that caught in my head. Tom Brown or William McKoney or something, you know. Just anything that would pop up.

Q: (DS) But you don't remember what those names were?

A: I don't remember what I asked for, no.

Q: (DS) What did they tell you?

A: They said, "Yeah, you can come on in and use the phone." So I went in and seen there was a phone and I said, "I got to go get the numbers," so I walked back out to the car and told Steve to come on it as soon as I get inside and everything. So I walked back up and the dogs let us in at that time because the people had done told them it was all right, right? So we went back up to the door and I had a 357 stuck in my belt and my shirt on top of it and then I got to the phone and picked it up and started dialing some numbers, just any numbers, and I don't know what numbers it was. I looked at the prefix and dialed those first three numbers of the prefix and dialed four more numbers, put the receiver down so it would disconnect, pretending like I was talking to somebody and I was looking at the door all the time to see if Steve come up and as soon as Steve come up, the man of the house, like that, and then I whipped it out, hung the phone up. And I said, "All right, everybody in the living room." I was the top of all the whole thing. I done all the talking and everything of the whole

STATEMENT OF GLENN BURTON AKE

(Answer continuing)

bit. I was pretending like I was a crazy man from the funny farm which I was just about at because I was all fucked up on whiskey.

Q: (GS) Did you tell them that you were crazy?

A: Yes.

Q: (GS) What did you tell them?

A: I told them I just out of of Ft. Supply. "I'm crazy, you better do what I say."

Q: (DS) And then what did you do, Glenn?

A: Made them all lay down; tied them up and started going through the house. Covered their heads up.

Q: (DS) Was Steve in the house at that time?

A: Yeah, at that time he was.

Q: (DS) Did he bring the shotgun in with him?

A: Uh-huh. It was unloaded; didn't have no shells in it.

Q: (DS) Was it?

A: Can't shoot nobody with an unloaded gun.

Q: (GS) What was Steve's job when he got into the house?

A: He was to go through everything; that's all he was good at. He was good at that. Going through jewelry boxes and stuff. Or finding hard to spot things, you know, losing stuff; like where people stash money and stuff. He was pretty fair at that but even though, he didn't find no money.

Q: (DS) You told us earlier that you -- that you wore gloves. Did you both have gloves on at this time?

A: Yeah, he did. I didn't at that time. As soon as I hung up the phone and got them all in the living room, I put the gloves on. And I think I wiped the phone off and I went out and yanked all the phone wires out of all the phones; the receiver parts, went through all those and yanked out all those.

Q: (DS) You did all that. You say ^{Steve did} didn't yank any phones out?

A: He might have yanked out one, I don't know. He might have found one that I didn't, I don't know. I found two or three though I did in that house.

Q: (DS) Were all four of the people laying on the floor?

A: Uh-huh.

Q: (DS) Where at in the house?

STATEMENT OF GLENN BURTON AKE

A: In the living room.

Q: (DS) Can you tell us where in the living room?

A: In front of the couch. One right in front of the couch; coffee table separating Mrs. and Mister and the girl was behind the man and the boy was up by the fireplace laying lengthways from the other ones.

Q: (DS) Okay, Glenn, at what point did you tie them up?

A: At that point as soon as I got them laid down.

Q: (GS) Did you tie all four of the people up?

A: I tied everybody.

Q: (DS) What did you tie them up with?

A: Rope, cords, anything I could find.

Q: (GS) Where did you find the rope and cords?

A: Kitchen. I asked Mrs. Douglass where there was any twine or any rope or anything before I had her lay down. She gave it to me. Is there any way I can get some water?

Q: (GS) Why don't we go ahead and continue this and I'll get you some water.

Q: (DS) Okay. While you were -- where did you end up getting the cords and stuff, did you say?

A: At the kitchen.

Q: (DS) Can you tell me what kind of cord it was and where it came from?

A: Nylon cord and I don't know where it came from in the kitchen.

Q: (DS) You say you bound all four of them?

A: Yes.

Q: (DS) Did you gag the people?

A: Yes, some of them. Yes, I did.

Q: (DS) What with, Glenn?

A: Pieces of cloth, anything I could find. Pieces of cloth, I think most all of them. I think it was all of them, pieces of cloth.

Q: (DS) Did any of the family go through the house with you?

A: Yes, I told the daughter to get up and find us all the money spots.

Q: (DS) This was before you bound her?

A: Right.

Q: (DS) Who went through the house with her? You or Steve?

A: Me. She gave us all -- she found us -- she went through the rooms, she showed up where all the money was and we had her

STATEMENT OF GLENN BURTON AKE

(Answer continuing)
get back in the living room and laid her down. Was trying to get in a hurry because we already took too much time.

Q: (DS) Where was Steve while you were going through the house with her?

A: In the living room.

Q: (DS) What was he doing?

A: He was looking through all the things in the living room and went into the other bedroom and looked for things. In the parent's bedroom.

Q: (DS) And the man and the woman and the boy were tied in the living room floor and the girl was with you?

A: For about fifteen minutes and then she was tied up.

Q: (DS) At any time did you assault or attempt to sexually assault the woman or the girl?

A: No, just tied them up.

Q: (DS) Okay.

A: All we wanted was the money.

Q: (DS) Did you take anything else, Glenn?

A: Just the watch.

Q: Did you take anything other than the watches? (DS)

A: All the change they had. There was one big old cup of quarters and nickels and dimes.

Q: (DS) Can you describe the watches to me?

A: Both of them were Seiko watches; blue face on one and white face on the other.

Q: (DS) Both of them men's watches or --

A: Both of them men's watches, yes. No woman's watch. Yes, there was -- no, there wasn't no woman's watch.

Q: (GS) Was there any other jewelry taken? (DS) Rings, necklaces?

A: Oh, yeah, two rings. Matching set, gold bands with red stones in them all the way around.

Q: (DS) How many stones you think?

A: Eight a piece or something like that.

Q: (DS) Okay. Where were those taken from?

A: I don't know. Steve got those. Maybe they were out of the master bedroom because they were a matched set so I would imagine they came out of the master bedroom.

Q: (DS) Back up just a little bit, Glenn, when you first went into the house or you both went into the house, where were the people in the house?

A: Mother was in the kitchen. The daughter was in the living room. The boy was in the living room and the man was in the living room -- bedroom.

Q: (DS) In the bedroom? Master bedroom?

A: When he came out though was just about whenever Steve cocked it through the door.

Q: (DS) Okay, after you go through the house with the girl, what do you do then?

A: Take her back in the living room and tie her up and told Steve to go outside and turn the car around.

Q: (DS) And let me understand correctly. You've told us they are all four tied up in the floor and..... (End of tape two) (Beginning of tape three)

A: Gagged.

Q: (DS) Were they covered up with anything or....

A: Their heads.

Q: What with?

A: Shirts, whatever we could find. Cloth.

Q: (GS) Who covered the heads?

A: Steve covered the heads.

Q: (GS) On all or part of them?

A: (Part of them and I covered part of them. I covered two and he covered two. He covered the boy and the mom and I covered the man and daughter.

Q: (DS) Okay, what did you do after you covered them up?

A: Looked through the house for about another two minutes or so. I spent too much time there so I told him to go out and turn the car around as he told me not to do anything that drastic, right, we're already in bad enough. I told him to go turn around the car and don't worry about it. I wouldn't do nothing, so he went out and started the car up and turned around and he head me shoot.

Q: (GS) What was the conversation that you had with the family? Were you talking to them?

A: Yeh. (Affirmative) I told them I was a crazy man.

Q: (GS) What were they saying to you?

A: Uh, they was just saying don't shoot us. That's it.

Q: (DS) Did you make any threats to them?

A: I said just be quiet or I'll shoot you.

Q: (DS) Did you know that the man was a preacher?

A: No, I didn't.

Q: (DS) Did anyone there tell you that he was a preacher?

A: Uh, no, they didn't tell me that.

Q: Okay, Glenn, did you make any threats to any one person?

A: No, I told them all, all the same.

Q: Okay.

A: All were in the same room when I was threatening. All in that room.

Q: (DS) Okay, after you told Glenn, excuse me, when you told Steve to go outside, did he go outside?

A: He hesitated for a few minutes, trying to calm me down because I was all spaced out. I was all fucked up on this, I done a bunch of speed in the car before we got there. Drinking whiskey and speed, they don't mix. He was trying to calm me out of it. Telling me come on, come on, lets get the fuck out of here, come on. I said just go out and turn the car around and shut up. So he went out and he turned the car around and shut up.

Q: (DS) How long was he in the car before you went out?

A: Three or four minutes.

Q: (DS) What did you do after he went outside?

A: Told the people, I says, I'm sorry but dead men don't talk. And then I emptied out six shots.

Q: (DS) Out of what?

A: .357 magnum, 38 special wad cutter shells.

Q: Okay, and who did you shoot first?

A: The man, the boy, the daughter, the mom, the man again, and I can't, I think I shot the boy twice.

Q: (DS) But you don't remember for sure?

A: I don't where I put that last shot. I was all fucked up.

Q: (DS) Okay, and then after you shot them what did you do then?

A: Ran out the door.

Q: (DS) When you ran out the door..

A: I slowed down and stopped because of all the dogs right there.

Q: (DS) Okay, but when you ran out the door did you think that all four people were dead?

A: I didn't know. I didn't think so. I thought I just hurt them bad enough, I tied them loose enough to where they could get away, but not right away. I wasn't intending to kill them all, I just wanted to hurt them where we could get out of state for awhile. We was pretty close to the stateline, we headed straight east. I didn't know they was dead or not. I was just saying that.

Q: (DS) Okay, you ran out the door...

A: All I wanted to do was hurt them bad enough to get out of state.

Q: (DS) You ran out the door and you slowed down because the dogs were barking.

A: Uh-uh (affirmative). There was six Doberman Pinchers, or a bunch of them anyway. I don't know how many, there was a whole bunch of them.

Q: (DS) Then what did you do?

A: That's when I hopped, I walked the rest of the way to the car, got about six foot from the door and ran out to the car. I said get the hell out of here.

Q: (DS) Who drove?

A: STEVE drove. He already had the car started and I told him that I couldn't drive.

Q: (DS) And...

A: I was too tired. I was like shaking like a leaf and I was all spaced out.

Q: (DS) And when you left, where did you go from there?

A: Went down the driveway and out and was on the highway before long. I know that. We was headed south.

Q: (DS) Did you know what highway that was?

STATEMENT OF GLENN BURTON AKE

A: We was on a dirt road before then. We came in from a different direction.

Q: (GS) What was the first thing you remember seeing after leaving the house?

A: The birdges. A wood bridge, a small one, real small, two foot on the sides.

Q: (DS) Was that before you got to the highway.

A: Yeah. Like a big creek or something. Right, just a rail, just a little guard rail, I wouldn't call it a bridge, little guard rails.

Q: (DS) Okay, after you got to the highway which direction did you turn?

A: We turned left. I think it was south.

Q: (DS) Okay.

A: Cause we ended up coming out of the south.

Q: (DS) Okay, where did you go from there?

A: Oklahoma City. Through Oklahoma City and we was worried about getting busted being in that car. And we went straight west across the border into Fort Smith.

Q: (DS) Straight west?

A: East. Excuse me.

Q: (DS) On what highway?

A: I think it was eighty. I sure it was eighty.

Q: (DS) Did you make any stops in Oklahoma City?

A: Nope. No stops. Straight through. We had gas.

Q: (DS) Did you make any stops between Oklahoma City and Fort Smith?

A: Rest stop. Take a piss. We stopped two or three times to do that. Not at just rest stops but just off the side of the road. And I was drinking pretty heavy. And that's against the law.

Q: (GS) What were you drinking at that time?

A: Boiler makers. Whiskey and beer, half and half. Half a can of beer and a half a can of whiskey. Canadian whiskey. Canadian Lord Albe. Same thing I was drinking before we got there. *CMW
JG-BF*

Q: (GS) Backing up just a moment, were you smoking cigarettes at the time?

A: Smoking cigarettes, smoking pot, shooting drugs, I was doing everything.

Q: (GS) What type of cigarette do you normally smoke?

A: Camel filter light.

Q: (GS) Do you know what STEVE normally smokes?

A: Marlboro's. But I, I ran out that night once. I had to borrow some of his to. He smokes Marlboro normally. But I was smoking his anyway. Cause I was forgetting mine in the car and smoking his in the house. I think maybe I brought one or something like that on me. I was smoking, I used to smoke Raleigh filter Kings

STATEMENT OF GLENN BURTON AKE

Q: (GS) Do you remember...

A: But I forget what kind of cigarettes I had with me that night cause I don't know. I don't know. All I know is that I was smoking.

Q: (DS) What kind of beer do you usually drink, GLENN?

A: Uh, Bud, Michelog, Lowenbraw.

Q: (DS) Anything?

A: Anything that's got, anything that's good. Any thing that Anhuser Busch usually.

Q: (DS) What kind does STEVE usually drink?

A: Anything that I drink. He usually goes along....I used to drink a lot of Old Milwaukee up there in Enid. A lot of it. A case and a half a day. It took about, oh, a good two six-packs to get me fucked up on beer. That's why I was drinking whiskey. Alot of the two. Whiskey and beer both.

Q: (DS) Okay, while we're backed up here, do you recall what you were wearing that day?

A: I was wearing a red construction company baseball cap, a blue shirt, a T-shirt shirt, that said on the side of it, in that little sign right here, with two fingers pointing like that, it said I'll show you mine, no, you show me your's and I'll show you mine, or show me yours and I'll show you mine, or something like that it said on it. Had levi pants on.

Q: (GS) What type of shoes?

A: Boots. My boots. The boots that's out here.

Q: (DS) What kind of boots are those?

A: Wolverines. They stink. Don't ever buy any. Feet sweat in them too much.

Q: (DS) What color are they?

A: Black.

Q: (DS) What was STEVE wearing that night?

A: I don't have the foggiest. I think he was wearing a flannel shirt.

Q: (DS) But you don't remember.

A: I don't remember what the hell it was. Cause I know that I got rid of that blue shirt and that hat.

Q: (DS) You said that you had on a red construction company hat.

A: Hat on, right.

Q: (DS) Do you remember what it said?

A: Red Construction Company.

Q: (GS) Where did you discard your clothing?

A: Uh, Tennessee, no, New Orleans. I got to New Orleans, that base-ball cap is probably still there. And, uh, uh, JACK THOMPSON's trailer bunk house.

Q: (DS) Okay, you stopped two or three times between Oklahoma City and Fort Smith to use the bathroom.

STATEMENT OF GLENN BURTON AKE

A: No bathrooms. We just pissed on the side of the road.

Q: (DS) Okay. When you got to Fort Smith, what did you do?

A: Rented a motel.

Q: (DS) Remember the name of the motel?

A: No, but it's across from the Ford place. It was across from the Ford place. I still got the card in my wallet from the Ford place.

Q: (DS) Do you remember anything else that it was close to?

A: Uh, shopping center. A small shopping center. In fact the parking lot combined with it.

Q: (DS) If I named some motels to you do you think you could remember the name of it?

A: No.

Q: (DS) What time of day was it when you got to the motel?

A: Late.

Q: (GS) What would be your best guess as to the time?

A: I wouldn't have the foggiest, to tell you the truth. STEVE went in and rented it. I had to stay in the car because I was to fucked up. Then he helped me, it was an upstairs too, cause he had to help me upstairs too.

Q: (DS) Do you remember the number of the room?

A: Two forty-three, I don't know for sure. I think it was somewhere around there though. I was in the back, way back. It was a big motel.

Q: (DS) Okay. How long did you stay there?

A: That night. The next morning we got on the bus.

Q: (GS) Which bus did you take?

A: Greyhound.

Q: (GS) Where did you go?

A: From there to Memphis.

Q: (GS) And where was the first place you went when you got to Memphis?

A: Ramada Inn.

Q: (DS) Before we leave there, how did you get from the motel to the bus?

A: Taxi cab.

Q: (DS) What kind of taxi cab?

A: Brown taxi. It was a brown colored taxi cab but it was called Black Taxi Cab, or something like that.

Q: (DS) What did you do with the car that you went there in?

A: Left right at the motel.

Q: (DS) Was this DEWAYNE LUCAS' car that you left there at the motel?

A: Yes, it was. That's probably how you can find out what motel it was.

STATEMENT OF GLENN BURTON AKE

Q: (DS) Okay. What time did you catch the bus?

A: Eleven o'clock in the morning. I was half way straight by that time. Eleven o'clock in the morning, I think. Somewhere around then.

Q: (GS) What type baggage were you carrying with you at that time?

A: Duffle bag. That's it.

Q: (DS) What did STEVE have with him.

A: Duffle bag. Same duffle bags that was in the back of that car in Colorado.

Q: (DS) Do you have everything that you had with you in the duffle bags?

A: Right.

Q: (DS) Where was the pistol at this time, GLENN?

A: In the duffle bag. Wrapped up in the sleeping bag. Unloaded.

Q: (DS) Where was the shotgun at this time?

A: Wrapped up in STEVE's sleeping bag, unloaded. Well, his was wrapped up, but the end of it was sticking out of the sleeping bag. Cause one of the trucks seen was the end of the barrel, one of the bus drivers did by throwing it around. That's why we didn't take an airplane. Cause on an airplane they search for weapons. In and on from top to bottom.. That's why we took a bus. We were scared every through every town we went through. Scared that there would be another, bunch of cops waiting there for us.

Q: (DS) Okay, after you got on the bus at Fort Smith, you had bought a ticket, I believe you said to Memphis, is that right?

A: Yeah.

Q: (DS) Did the bus make any stops between Fort Smith and Memphis?

A: Lots of time.

Q: (DS) Did you ever get off the bus anywhere?

A: No.

Q: (DS) Did STEVE ever get off the bus anywhere?

A: No.

Q: (DS) So, you went directly to Memphis?

A: Right. Well, we got off the bus at one time at one place. And I ran about six blocks to get a bottle a whiskey cause I had the shakes.

Q: (DS) Do you remember where this was?

A: I don't remember what town it was. I know, I seen a liquor store as you pull right up into the bus station. So, I ran back and bought a half gallon of whiskey. Went back to the bus. Started drinking it and got calmed down a little bit and went to the bathroom and shot some more drugs up.

Q: (DS) On the bus?

A: On the bus. By the water container is where I done it. About a thousand points. A thousand syringe needles. With one glass (inaudible) I didn't need help to shoot up. I shot it by Syringe

SWORN STATEMENT OF GLENN BURTON AKE

myself one time. Then when STEVE shot up I shot him up. Cause I was good with a needle.

Q: (DS) Was STEVE shot up this day?

A: Yeah, I think so.

Q: (DS) Was he shot up on the fifteenth, the day you pulled the

A: Yeah, sure was. We had about six grams of cocaine, about ten grams of speed, and a quarter pound of pot at that time, before we took off from Enid, which we got from a local, which I rather not say, because he is one of the big dealers there.

Q: (DS) You say that you don't want to say?

A: Right. He is the biggest dealer around Enid. He is one of the only ones that can get dope from California and bring it in and sell it for little bit or nothing.

Q: (DS) Does he live in Enid.

A: I'd rather not say.

Q: Okay.

A: He lives in, in the, he sells to Enid, let's put it that way.

Q: (DS) Okay, you got to your whiskey and rode the bus on to Memphis, what did you do when you got to Memphis?

A: We went across the street to get, got a motel cause we was all fucked up at the time we got there.

Q: (DS) Just across the street.

A: Just across the street.

Q: (DS) There was a motel right there?

A: Right. And then there was a bunch of cops came to that bus station and surrounded it and we thought they was after us. Which they might have been. We don't know who they was after. We was across the street, the third floor, in the Ramada Inn, looking out the window watching them do this. Two days.

Q: (DS) It was a Ramada Inn that you stayed at in Memphis?

A: Right.

Q: (DS) Right there at the bus station?

A: Right across the street, about a block down from, about a block.

Q: (DS) Do you remember what room you stayed in?

A: Third floor. I don't know what number it was. It was an end room closest to, it was the east end room closest to the road, third story. Had a real sexy looking bartender. Nothing but a hooker.

Q: (GS) What did you do while you were in Memphis?

A: Scored some drugs and stuff. We met this taxi cab driver who got a couple of hookers. Lost four hundred bucks from those hookers. And partied like a son of a bitch. Drank twenty-five Singapore slings the first night, a piece, on top of what we had.

Q: (DS) Where at?

A: At, uh, the room. And at, uh, oh, one of those topless joints.

STATEMENT OF GLENN BURTON AKE

A: By Annie Fannie's Place, it's called the Library. The Library. You know, at Annie Fannie's we had the Singapore slings. At the Library we finished up drinking beer.

Q: (DS) What were you paying for all this with?

A: Cash.

Q: (DS) Did you you run a tab until you got ready to leave every where you went?

A: Nope.

Q: (DS) Paid for it each time you had a drink?

A: Each drink.

Q: (DS) Did you do any drinking at the club at the Ramada Inn?

A: Yeah. Singapore slings. We ran a tab there and then paid it up.

Q: (DS) Do you remember how much your tab was that night?

A: Sure don't. Sure don't. Everybody in that place knows we was all drunker than shit, though.

Q: (DS) Did you get into any hassles while you were in there?

A: Nope. None that I can remember anyway. I don't know when I'm drinking whiskey what I do. I black out. And that's what the point was there in Memphis. I was at the stage I didn't know where I was at. I don't know how I got there. I don't know how I got upstairs or nothing. All I knew was STEVE always drug me around and took care of me. That's why I like being in his company cause he would always take care of me and get me to the room instead of getting arrested.

Q: (DS) You and STEVE are brother-in-laws, right?

A: Right. Well, no, not no more.

Q: (DS) But he was married to your sister?

A: Right. They got a divorce.

Q: (GS) When did you leave Memphis?

A: Two days later. Third day we left.

Q: (GS) And how did you leave?

A: Bus. To New Orleans. We rode the bus all the way to New Orleans.

Q: (DS) You said you lost four hundred dollars to hookers there.

A: Taxi cab driver set up a couple of hookers. And they ripped us off for four hundred, we had the rest of the money stashed in the vent.

Q: (DS) In a vent? What kind of vent?

A: Vent in the room. Air duct. STEVE's good about finding hiding places. And he decided let's hide the money. Just keep out of debt.

Q: (DS) Okay, you had two hookers in the room with you?

A: Yeah.

Q: (DS) How did they rip you off, GLENN?

A: Slipped us something. In our drinks or something. Made us pass out.

STATEMENT OF GLENN BURTON AKE

Q: (DS) Where did they get the money from?

A: Out of my wallet and out of his wallet.

Q: (DS) All right. Then you, did you tell us you took a bus and left there?

A: Yeah, sure did. And then we went to New Orleans.

Q: (DS) What kind of bus did you take?

A: Continental Trailways. We switched buses, bus companies. We rode all the way down there Continental Trailways to New Orleans. Got off at New Orleans, rented a motel.

Q: (DS) Remember the name of the motel?

A: No, I don't.

Q: (DS) How long did you stay at that motel?

A: One night.

Q: (DS) Then what did you do?

A: Um, I think we stayed in New Orleans two days too, in the motel, cause we could only get that one for one because they already had it rented out for the next day to someone else. It was already booked. New Orleans is a hard place to get a motel you have to call for reservations or put up in front where you don't have one. We rented this other motel and stayed there a night and we got on Bourbon Street and seen all the sights there. There ain't nothing to see, just a ghetto. And then the next day we headed out on Greyhound.

Q: (GS) Where did you go?

A: From there to Homa, New Orleans.

Q: (DS) Homa, Louisiana, you mean?

A: Homa, Louisiana, yeah, excuse me.

Q: (GS) What did you do in Homa?

A: Look for a job. Stayed around the motel one day. Then we came back hitchhiking. We were getting low on cash. Hitchhiked back up and that's when we seen that carnival.

Q: (GS) What carnival did you see?

A: JACK THOMPSON's show. Uh, it was, uh, New Orleans.

Q: (DS) Where is the carnival itself located?

A: Uh, I don't know, to tell you the truth. I didn't know that much about Louisiana.

Q: (DS) You told us earlier....

A: It's just south of New Orleans.

Q: (DS) You told us earlier that you got rid of the pistol to somebody that picked you up while you were hitchhiking, is this time?

A: Yeah, that was the time. From Homa back to the carnival is where I got rid of the pistol.

Q: (DS) And you do not remember the man's name.

STATEMENT OF GLENN BURTON AKE

A: No, I never even asked the man's name.

Q: (GS) Do you know what type of occupation he was in?

A: Oil field. Off shore. He was a welder. And he got hurt.

Q: (DS) Do you know how he worked for?

A: Sure don't. He drove a green beat up truck he was in.

Q: (DS) Pickup truck?

A: No, it was a flat bed. You open up the door and the door falls off. Only had one hinge holding the door on it, on both sides. Try to sell it to him for a hundred. All he had was fifty he said. So, I sold it to him for fifty. It was a hot gun anyway. It was already a gun that was in a robbery and committed a crime. Even I know that ballistics could show a thirty-eight shell through a .357 couldn't tell. I wouldn't take no chances, I sold it to him.

Q: (DS) Okay, then you saw the carnival.

A: And then I went to work for the carnival. Went up there and hired out to them. Stayed in a motel. The Fiesta Motel.

Q: (DS) Was this day time, night time?

A: It was day time.

Q: (DS) You went to work for them right then?

A: Well, went there, yeah, went to work for them and he told us it was their last night there, so, told us they wasn't doing no hiring, he said come back that night if we made good help sloughing. That's when they tear it down. So they call it sloughing.

Q: (DS) Sloughing means tearing down.

A: That's what it means, tearing down, getting ready to move. They said if we made good hands there they would put us to work. So we went out there and worked like to niggers, we were slaves, they put us on.

Q: (GS) How long did you work for this carnival?

A: Week, maybe two weeks.

Q: (GS) And where did you live during this time?

A: On the show, on the grounds itself. In sleeping bags, in trucks, underneath trucks.

Q: (GS) Where was that located from where the carnival was?

A: Right on the lot. Right on the lot, right where everything was at. That's where they sleep.

Q: (GS) Was this carnival stationary while you were working for them?

A: No, they would move around all the time. I think they moved the show three days, one spot five days, the last spot was a ten day spot and we got fired on it.

Q: (DS) Why did you get fired?

A: Cause I got everybody drunk all the time. They all picked up my habits. They told me to come back next year. If I ever wanted to come back they would give me a good ride if I could get off the whiskey.

Q: (DS) What did you do for the carnival?

A: I was running the double ferris wheel. A big ride man.

Q: (DS) What did STEVE do?

A: He run the sizzler. It was like the sizzler. Yeah it was the sizzler. That's what it was, a sizzler. Same thing as a, just little thing. They are just those little rides from up to, but they are for adults.

Q: (CS) Did you do anything else that caused you to be fired?

A: Yeah, shot off a shotgun shell. Did that on a night when we was all drunk. Right in the air. Just shot it in the air. We was all fucked up. We was all drinking Johnny Walker and Canadian. we drank about, about two gallons between about eight people.

Q: You mentioned to us earlier that it was a long barrel gun but it ain't no more.

A: No, that's where we sawed it off at. Right there.

Q: (DS) At the carnival?

A: At the carnical

Q: (DS) When did you saw it off?

A: One night when we was all drinking.

Q: (DS) Who sawed the gun off?

A: I did.

Q: (DS) Was it sawed off before you shot it the night you are talking about then?

A: Yes. It made a pretty good noise. Everybody came out with their artillery in hand ready to shoot them guns. He came over, we gave, we had a bunch of twenty gauge shells that didn't fit nothing, we gave him that and told him that was all the shells. We told him just take the cap off and popped them with a hammer.

Q: (DS) This show was named Jack Thompson's Shows, did you say?

A: Right.

Q: Was he there?

A: Yes.

Q: (DS) Did he fire you right then?

A: No. He waited until he got some more work out of us then he fired us.

Q: (DS) When was this?

A: Oh, about two days later.

Q: (DS) After he fired you what did you do?

A: Went on down the road. Started hitchhiking and that's when we went into Texas. No we got a bus there because we had the money then, that he gave us.

Q: (DS) Did you leave that day or did you stay and

A: We left that day.

Q: (DS) You didn't stay in New Orleans any I ger after you got fired?

A: Nope.

Q: (CS) How much money did you have with you at that time?

A: Hundred and twenty dollars, between us. We had to buy three tickets with it.

Q: (DS) Three tickets?

A: Yeah.

Q: (DS) Why the third ticket?

A: That's where we picked up Ginger at?

Q: (CS) Where did you meet Ginger?

A: I met her at a laundromat. We was sitting there, we went to buy a pack of cigarettes and I bough some cigarettes. She was standing at the laundromat door and I was sitting in this car and I thought she looked familiar. Then she came over to the car that was parked beside and talked to somebody else. And she said don't I know you and I said yeah, I know you too don't I. And she said from Schahoni, Wyoming and I said yeah. She said I'm Ginger. I said yeah, I said do you know who I am. She said yeah, you're Skip. I got out there, I stayed with her. Went to her house. She started being my girl then.
(End of tape three)

Q: (CS) Ginger was your girl?

A: She was going to be my girl. She said she wanted to get away from her boyfriend down there. I said, "Well, just come on with me." That's whenever I got fired from the carnival right then because they didn't want no girl being with me. Otherwise, I would probably be still working for them.

Q: (CS) Do you remember her full name?

A: No, I don't. To tell you the truth, I didn't even remember whenever she seen me at all until she said it.

Q: (DS) Okay, you said you bought three tickets, three bus tickets.

A: That Paul's place, Lake Charles.

Q: (DS) Okay.

A: We got on the bus there. We got a cab. We got on the bus there.

Q: (DS) You got a cab from where?

A: From the motel.

Q: (DS) You were staying at a motel at that time?

A: Yeah.

Q: (DS) I thought you said amminute ago that you -- left as soon as you got fired.

A: Yeah, well, we got fired at night; about eleven o'clock at night so we went to that motel and stayed the night and that morning we left.

Q: (DS) I see. Okay, let me ask you a question, Glenn, from the time you left: End up to this point, have you made any phone calls back to any of your folks or anywhere back here in Oklahoma?

A: Yes, I did.

Q: (DS) Who did you call?

A: I called my parents house. My sister answered the phone. I told her it was bugged so I only talked to her about a minute.

Q: (DS) When..

A: She said they're looking for you. I said, "That's all I want to know. Good-bye, I'll talk to you later in another state," and hung up the phone.

Q: (DS) When did you make this phone call?

A: This was in -- keep wanting to think it's Ft. Smith, but I think it's in Memphis where I called from and I called right on the way before we left. Before we got our bus.

Q: (DS) Where did you call from?

A: From Memphis, I think. Memphis.

Q: (DS) I mean where at in Memphis? From the motel?

STATEMENT OF GLENN BURTON AKE

A: Motel itself, yeah.

Q: (DS) Okay. Did you make any more phone calls?

A: No. I made one when we left Louisiana from the motel that morning. She said the phone ain't bugged. She said they're looking pretty hard; FBI and everybody's looking for you.

Q: (DS) From when motel? You're talking about the morning you left New Orleans to go to Lake Charles?

A: Right. That motel.

Q: (DS) And who did you talk to?

A: My sister again. No, my mom. She says, "I don't know what you're going to do. I don't know what you're going to do." That's all she could say. I said, "I love you, I'll talk to you later. I've got to go. Good-bye."

Q: (DS) Did you tell her where you were going?

A: No, I didn't tell her where I was. I never told nobody at the house where I was calling from or where I was going because I didn't know myself.

Q: (DS) Did you tell them you would be back or --

A: No.

Q: (DS) You didn't tell them anything when you talked to them?

A: Just told them I loved them and that was it.

Q: Okay. You get on the bus at New Orleans to go to Lake Charles. What bus did you ride?

A: Greyhound.

Q: (DS) Tell us about that.

A: We rode all the way to Nashville. Lake Charles where we met a guy about fifty miles before we got to Lake Charles that lived in Orange County, Texas. Lived in Orange, Texas, the town.

Q: (DS) Met him on the bus?

A: Met him on the bus, yeah. He was drinking whiskey with us on the bus and he got a little crazy and the bus driver about kicked him off.

Q: (GS) What was his name?

A: I'm not good at names, but I can show -- I can see a face, but I don't know names unless I deal with them or something. I don't know who he was still.

Q: (GS) Where did you go with him?

A: To his house. And his wife and his daughter and us at the bus station.

Q: (DS) You said he lived in Orange.

A: Yes.

Q: (DS) Now did you get any farther than Lake Charles, if you just bought a ticket to Lake Charles?

STATEMENT OF GLENN BURTON AKE

A: We bought another ticket from Lake Charles to Orange.

Q: (DS) Did you?

A: Uh-huh. About a fifty mile ride, forty mile ride, something like that.

Q: (GS) What was the reason for going to Orange?

A: Because he said he could put us up for the night. Because we said we were traveling and we had to get back on the road. We stayed there two days and then he gave us a ride out of town.

Q: (DS) What did you do when you were there?

A: Just drink; sit around and bullshit.

Q: (DS) Do you know what he did for a living?

A: He worked on a ship.

Q: (DS) Where at?

A: Out of New Orleans; somewhere out of New Orleans, some kind of ship, I don't know what it is. Freighter. He was a captain.

Q: (DS) Do you --

A: Of the ship.

Q: (DS) Do you know where his house was in Orange?

A: I could find it, but I don't know where it is.

Q: (DS) You don't know where to tell us where it is?

A: No, sure don't but there was quite a few rooms in it. I can barely remember how to get to it myself.

Q: (DS) Why did you decide to leave his place?

A: Because he wanted us to leave. He give us a ride out of town.

Q: (DS) Where did you go from there?

A: Up to that place in Texas. By that park.

Q: (DS) Do you remember where this was?

A: No, I sure don't.

Q: (DS) And you and Steve and Ginger all went with him from his house in his car --

A: Just a little Datsun pickup, yes.

Q: (DS) In his Datsun pickup?

A: Uh-huh.

Q: (DS) And what was the conversation then the reason you got out?

A: That we had to leave?

Q: (DS) No, that you got out of his truck. You said you got out of the car.

STATEMENT OF GLENN BURTON AKE

A: Well, that's as far as he was going to take us. He was going to a gas station to get some tires fixed or something. Lennie was his name.

Q: (DS) Lennie?

A: Lennie.

Q: (GS) Where did he let you out?

A: On the side of the road, close to a park, that's all I know.

Q: (GS) Where did you go?

A: Across the street to the park.

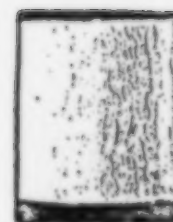
STATEMENT OF GLENN BURTON AKE

CANADIAN COUNTY

SWORN AFFIDAVIT

PAGE # 35

STATEMENT OF GLENN BURTON AKE

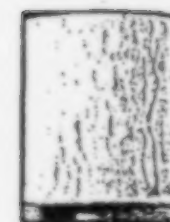


CANADIAN COUNTY

SWORN AFFIDAVIT

PAGE # 36

STATEMENT OF GLENN BURTON AKE



STATEMENT OF GLENN BURTON AKE

Q: (DS) How far west on I-10 did you go?

A: All the way in to New Mexico.

Q: (DS) Did you make any stops from the time you left there until you got to New Mexico?

A: Gas and stuff, that was it. We went straight through. Texas all the way to California. Non-stop.

Q: (GS) How did you pay for your gas?

A: Cash. Well, not all the way to Nevada.

Q: (DS) What time of the day did you leave Texas?

A: Evening time.

Q: (DS) Did you stop and spend the night any where?

A: No. Drove all night long. Tired us out. Came that morning, I wake up and I was driving.

Q: (DS) What kind of plates did the car have on it?

A: Had Texas plates on it. We switched them to Alabama plates. From Alabama plates to California plates.

Q: (DS) When did you change plates?

A: In Texas shortly -- that night. We left in the evening, about seven o'clock at his place and it was about eleven o'clock before we changed plates.

Q: (GS) Did you keep the Texas plate?

A: Yeah. No, we threw them away.

Q: (DS) Whereabouts?

STATEMENT OF GLENN BURTON AKE

A: At a rest stop. Where at, I don't know.

Q: (GS) About what date --

A: But it wasn't in Texas. I don't know what day it was. I wasn't keeping track of days.

Q: (DS) Do you know what day of the week it was?

A: I don't know what day of the week -- oh, Friday was payday.

Q: (DS) Was it a Friday?

A: It was Friday, I know that. I am pretty sure it was Friday. Might have been a Saturday or Sunday. I don't know for sure what approximate date it was on.

Q: (DS) Okay. After you went through Texas and got into New Mexico, where did you spend the night?

A: We didn't. We drove on.

Q: (GS) Where did you drive on to?

A: Heading towards Las Vegas. Stayed the night in Las Vegas.

Q: (GS) Do you know which motel?

A: No, we gambled all night. The next morning was day light and we went on North, towards Reno, but we've never been as far as Reno. We was heading on our way to Reno. We didn't make it towards Reno, we cut off over into California. Was getting low on cash again. Headed down south from there; I don't know what highway we was on -- we was on 357 or something like that. I don't know what highway that was and we stopped and I used that Gulf credit card one time. We got over to Barstow and there was no place to use Gulf so we started using that Visa there and we headed north into California, my hometown, and seen my old house and headed on north. Let's see -- we stayed in a motel, no, we didn't. We went on north and started cutting over west to Nevada. We got into Reno. We stayed the night there in Reno I think. I don't know where at and we gambled that night, the next day, lost our money, most of it. Had three or four hundred dollars left. I gave some money to Steve. I kept the rest. I knew he couldn't handle money.

STATEMENT OF GLENN BURTON AKE

(Answer continuing)

We made it on into Battle Mountain and then I bought a bunch of whiskey and we partied for three days there, drinking whiskey and stuff and we left and headed into Utah. Stayed in Utah, Salt Lake, spent a couple of nights in Provo, couple, three nights. Three nights, I believe it was and then we went into Wyoming. Stayed the night in Rock Springs. The next day we went to Baggs and that's where we got Russell at. Right out south of Baggs that night.

Q: (GS) If you would, describe your activities while you were in Baggs.

A: Went over to see some friends I had.

Q: (GS) Who were the friends?

A: The friends -- weren't even home. They were Rosyan and Johnny.

Q: (GS) What's their last name?

A: I don't know. I know they are not married. They lived together for eight years, but they're not married. And then I went over to see Linda Crowdad and that's where my old lady and Linda got together and I guess that's where they decided to turn me in. Then I was in a bar and found out what they were going to do and busted her glasses went for my gun; couldn't find no gun; the cops found me I did a chow.

Q: (GS) What were you going to do with the gun?

A: I don't know what I was going to do it. I was just going to take it and head south; get out of here. Head back west.

Q: (DS) What kind of gun was this?

A: Seven millimeter rifle.



STATEMENT OF GLENN BURTON AKE

Q: (DS) Okay. In Baggs, you said you busted Ginger's glasses. Then what did you do?

A: Left.

Q: (DS) Left the bar.

A: Left the bar.

Q: (DS) Where did you go from there?

A: Went back to find the gun; couldn't find the gun. The cops seen me so I took off like a bat out of hell. I lost them.

Q: (GS) What were you driving at that time?

A: A 280-2.

Q: (DS) What kind of plates did you have on it at that time?

A: California.

Q: (DS) Where did you get them?

A: Stole them off the car that was abandoned on the road, a Chevy Vega Station Wagen. Had the windows all broke in on it, but the plates were still good on it. I looked at the plates.

Q: (DS) What do you mean they were still good?

A: They still had the time left on it before it expired. It ran through December.

Q: (DS) Okay. You said the cops got after you. What happened there?

A: Pardon?

Q: (DS) You said the cops got after you in Baggs. What happened there?

A: I lost them. I went out of Baggs and went south and lost them. A high-speed chase.

Q: (DS) Can you tell us how you lost them?

A: We was going straight down the highway south towards Craig, Colorado, and I got up to a speed of 135 and left them behind

STATEMENT OF GLENN BURTON AKE

(Answer continuing)

me. I slowed down long enough for me to go into a power slide and turned back around to 180 and turned back around and went and passed him up. He was going the other way and I was going this way. He probably thought I was regular traffic. And I cut off on this other road --

Q: (DS) You were going back towards Baggs at that time?

A: Right. And then I cut off on this other side road where I knew where a oil field was. Went down that road a few miles, pulled off on this other road, killed our lights and everything, backed up, got turned around and whenever I seen him go by and seen the lights go out of sight, I went on back out to the highway and headed south again. That's where we found that guy's house and we turned off at his house just to get off on another road. Didn't know where we was at.

Q: (DS) Did you drive up to his house?

A: Drove as much as we could until the snow stopped us. Got stuck in the snow.

Q: (DS) Got stuck in the snow?

A: Uh-huh.

Q: (DS) How far from his house?

A: Hundred yards.

STATEMENT OF GLENN BURTON AKE

STATEMENT OF GLENN BURTON AKE

Q: (DS) Okay. You were arrested and taken to jail there in Craig, Colorado. Is that correct.

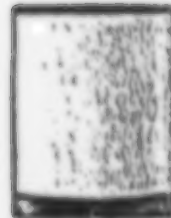
A: Correct.

Q: (DS) How long was that before we came up there?

A: From that morning to that evening. And we were extradited that night up here.

Q: (DS) Okay. Glenn, is there anything else you want to say to us?

A: Yes, there is. Out of all this here, I want the death sentence.



STATEMENT OF GLENN BURTON AKE

(Answer continuing)

And I want an injection as soon as possible. After -- I would like to have a little bit of time to see my parents and my nephew and then I'm ready to be executed, but this shouldn't be on Steve's part because Steve can't kill nobody because he don't have no guts to do nothing. All this doing was my brain; none of his. He just went along with the program because I think he was scared of me. That's all I have to say.

Q: (DS) Okay. Since you say that's all you have to say, let's end this conversation interview with Glenn Burton Ake. This interview began at 9:05 p.m., on Friday, the 23rd day of November, 1979, and will end at 11:35 p.m., on the same day. The same three people are present as at the beginning.

I have read this statement consisting of 44 pages, and I certify that the facts contained therein are true and correct. I further certify that I have made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

WITNESS:

WITNESS:

Subscribed and sworn to before me, Carol Nichols, a Notary Public, this 26th day of November, 1979.

My commission expires: 2-6-81.
(Seal)

Carol Nichols
Notary Public

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OFFICE OF THE
SUPERINTENDENT



STATE OF OKLAHOMA
DEPARTMENT OF MENTAL HEALTH

EASTERN STATE HOSPITAL

VINITA, OKLAHOMA

74301

1 April 1980

ADDRESS ALL COMMUNICATIONS
CONCERNING PATIENTS TO THE
SUPERINTENDENT, GIVING THEIR
FULL NAME, FOR PROMPT REPLY.
PLEASE ENCLOSE SELF-ADDRESSED
STAMPED ENVELOPE.

The Honorable Floyd L. Martin
Judge of the District Court
In and For Canadian County
El Reno, Oklahoma 73016

CRF-79-302

Dear Judge Martin:

Re: AKE, Glen Burton #32391
Your Case Nos. CRF 79-302, 303, 304 & 305

The above-named was admitted to this hospital by your order for a period of observation not to exceed April 10, 1980, on March 6, 1980. Criminal charges are pending.

We have completed our evaluation of Mr. Ake and it is the opinion of our staff that he does not have sufficient ability to consult with an attorney and he does not have a rational or actual understanding of the proceedings pending against him. Since Canadian County is not in our catchment area we would recommend that court action be taken to have committed to Central State Hospital at Norman, Oklahoma for care and treatment.

Please remove him from this hospital at your earliest convenience.

Respectfully,

[Signature]
D. Garcia, M.D.
Chief Forensic Psychiatrist

RDG:ml

cc: District Attorney, Canadian County, ElReno, Oklahoma
County Sheriff, Canadian County, ElReno, Oklahoma

1 Clyde Gene [illegible] [illegible] [illegible]

CO: [illegible] [illegible] [illegible]

ST: [illegible] [illegible] [illegible]

LD: [illegible] [illegible] [illegible]

[Signature]

APPENDIX - 2 LETTER FROM DR. GARCIA DATED MAY 22,

1983.

APPENDIX - 3 PARTIAL TRANSCRIPT OF PROCEEDINGS OF
JUNE 23, 1976 WHERE PETITIONER WITHDRAWS HIS MOTION FOR
JURY TRIAL ON THE ISSUE OF PRESENT SANITY.

1 of tendering this witness at this time, but more so to escape
2 an abbrasive break in the continuity of the trial, and for
3 security reasons.

4 THE COURT: All right.

5 MR. GOERKE: It does relate to his present sanity.
6 But, that's not the purpose we would tender it.

7 THE COURT: Okay. All right. Do you have any objection
8 to that?

9 MR. BREWER: No objection to that. But, if the Court
10 please, at this time we will--

11 THE COURT: Just a moment.

12 (Judge receives phone call.)

13 MR. BREWER: We are going to at this time withdraw
14 our Motion for Sanity Trial to Determine Present Sanity on and
15 for the following reasons: One, that he has just returned from
16 Vinita. The State's doctors have certified him competent to
17 stand trial. We still raise the issue of sanity at the time
18 the crime was committed, and the possibility of his sanity
19 becoming rational and unrational from time-to-time, which we
20 will inform the Court as this progresses. But, we feel as far
21 as time, and as far as the time element involved we feel that
22 at this time the testimony would primarily be that he was
23 certified incompetent to stand trial by independent private
24 practitioners. Sent to Vinita, and while at Vinita certified
25 that he now was competent to stand trial. We do not at this

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1 t.me waive any rights as to his mental competency at the time
2 the crime was committed.

3 THE COURT: So, the Motion for Jury Trial on Present
4 Sanity is hereby withdrawn, is that correct?

5 MR. BREWER: Yes. Is that agreeable with you, Mr.
6 Strubhar?

7 MR. STRUBHAR: Yes.

8 (Court is recessed.)

9 (Court is called to order in chambers with the Court
10 and counsel being present.)

11 THE COURT: Let the record show we are all present.
12 Mr. Brewer, you have withdrawn your Motion for Jury Trial on
13 Present Sanity. You also have an issue pending, a Motion for
14 Change of Venue.

15 MR. BREWER: Yes, sir, on that Present Sanity, there
16 is just one thing that we request on our withdrawing our Motion
17 for full jury trial, is that we would like the State to put on
18 that one witness that they brought before us saying that they
19 had some security reasons. And, if the State will do that, then
20 we won't ask for the jury trial.

21 THE COURT: Well, I don't think -- this wasn't to
22 present sanity.

23 MR. BREWER: Wasn't it on present sanity?

24 THE COURT: No, it was on a different issue.

25 MR. BREWER: Okay.

APPENDIX - 4 PETITIONER'S MOTION FOR NEW TRIAL

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FILED

IN THE DISTRICT COURT OF CANADIAN COUNTY

REC JUL 25 AM 8:40

STATE OF OKLAHOMA

CLYDE GENE MILLER
CLERK OF COURT

Sharon Hill

THE STATE OF OKLAHOMA

Plaintiff,

- vs -

GLEN BURTON AKE,

Defendant.

NO. CRF-79-302 303, 304,
& 305

MOTION FOR NEW TRIAL

COMES NOW the Defendant, GLEN BURTON AKE, and moves the Court vacate, set aside, and hold for naught, the verdict rendered herein on the 26 day of June, 1980, in the above styled and numbered causes, the Defendant being aggrieved thereby and to grant a New Trial for the following reasons which affect materially and substantially the rights of the said Defendant.

1. Error of law occurring at the trial and excepted to by the Defendant.
2. Error committed by the prosecuting attorney in both his presentation of the case and during closing argument.
3. Error by the Court in introducing certain heresay statements.
4. Error committed by the Court in introducing certain evidence, in the particulars, To-Wit:
 3. Introduction of gory pictures of decedent.
 6. Error committed by the Court in not granting a change of Venue due to the unfavorable publicity which was caused to be made by the District Attorney's Office.
7. The verdict was not substantiated by sufficient evidence.
8. The Defendant was under heavy medication and unable to comprehend the proceedings and was unable to assist Defense Counsel.

9. Defendant, GLEN BURTON AKE, was mentally ill at time of trial and was so stated by Doctors during trial.

10. GLEN BURTON AKE, was incompetent to stand trial because the only way to control Defendant was to heavily sedate Defendant.

GLEN BURTON AKE

BY:

J. Malone Brewer
J. MALONE BREWER
ATTORNEY FOR DEFENDANT
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OKLAHOMA CITY, OKLAHOMA 73106
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Richard Strubhar
By El Greeningham
RICHARD STRUBHAR
ATTORNEY FOR DEFENDANT
403 VANDEMYNT
YUKON, OKLAHOMA 73099
(405) 354-2535

CERTIFICATE OF SERVICE

This is to certify that on this 25 day of July, 1980, a true and correct copy of the above and foregoing MOTION FOR NEW TRIAL was sent to BILL JAMES, ASSISTANT DISTRICT ATTORNEY, CANADIAN COUNTY COURTHOUSE, EL RETO, OKLAHOMA, 73036.

J. Malone Brewer
J. MALONE BREWER
ATTORNEY-AT-LAW

Richard Strubhar
By El Greeningham
RICHARD STRUBHAR
ATTORNEY-AT-LAW

Clyde Gene Miller, Clerk of Court
County of Canadian
State of Oklahoma
with me
CLYDE

Sharon Hill

aw
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13
No. 83-5424

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

GLEN BURTON AKE,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITIONER'S REPLY BRIEF

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November 30, 1983

9 p12

TABLE OF CONTENTS

I. Petitioner's Sanity was Clearly and Seriously at Issue in the Trial Court 1

II. Petitioner's Constitutional Claims were Adequately Preserved 3

 A. The Denial of Psychiatric Examination 3

 B. The Drugging During Trial 4

III. This Case Merits Plenary Review 5

Conclusion 6

TABLE OF AUTHORITIES

Cases	page
Ake v. State, 663 P.2d 1 (Okla. Cr. App. 1983)	1, 2, 4
Bush v. Texas, 372 U.S. 586 (1963)	5
Griffin v. Illinois, 351 U.S. 12 (1956)	5
Irvin v. State, 617 P.2d 583 (Okla. Cr. App. 1980)	4
Jenkins v. Georgia, 418 U.S. 153 (1974)	4, 5
Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir. 1979)	1, 5
Raley v. Ohio, 360 U.S. 423 (1959)	4, 5
United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953)	3, 5, 6

No. 83-5424

IN THE SUPREME COURT OF THE UNITED STATES
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GLEN BURTON AKE,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITIONER'S REPLY BRIEF

Respondent's opposition to the petition for a writ of certiorari misstates the facts of this case and confuses the questions presented for review.

I. Petitioner's Sanity was Clearly and Seriously at Issue in the Trial Court.

Respondent cites Pedrero v. Wainwright, 590 P.2d 1383 (5th Cir. 1979), for the proposition that an indigent defendant's sanity at the time of the crime must be "seriously in issue" before the state is obliged to provide him with a psychiatric examination or the means to obtain one. Opposition at 8. Petitioner does not take exception to this standard. But this is not the standard that was applied to him under Oklahoma law. In Oklahoma, an indigent defendant is not entitled to a psychiatric examination even if his sanity at the time of the crime is seriously in issue. Ake v. State, 663 P.2d 1, 6 (Okla. Cr. App. 1983), Appendix to Petition for Certiorari (hereinafter "Pet. App.") at 6.

Oklahoma attempts to avoid review of its policy by arguing, in essence, that petitioner Ake was not harmed by the application of the policy in this case because "there is nothing" in the record to support his insanity defense. Opposition at 7. The facts are otherwise.

Petitioner's mental state at arraignment was so obviously abnormal that the judge sua sponte ordered him committed for observation. He was at first found incompetent to stand trial, and seven weeks later rendered "competent" only by being heavily sedated with large doses of Thorazine three times a day during the trial. The doctors who examined him concluded that he was suffering from paranoid schizophrenia at a psychotic level. Tr. 576, 592, Pet. App. 41, 47.

Dr. Allen, a court-appointed psychiatrist who examined Ake to determine his competency to stand trial, testified that Ake's mental illness may have dated from childhood, and that the illness may have been "apparent" on the day of the crime. Tr. 566, Pet. App. 36. Dr. Garcia, Chief Forensic Psychiatrist at Eastern State Hospital, examined Ake at length and was asked the hypothetical question whether a person of Ake's mental condition who consumed large quantities of alcohol and hallucinogenic drugs together (as Ake did on the day of the crime) would be able to distinguish right from wrong. He testified: "I would consider him unable to do so." Tr. 592, Pet. App. 47.

Under Oklahoma law, a defendant has the burden only of raising a reasonable doubt of his sanity at the time of the crime in order to put his mental condition in issue. Ake v. State, 663 P.2d at 10, Pet. App. 10. In light of this standard and the evidence just reviewed, it is fatuous for the State to contend that Ake's sanity was not seriously placed in issue. The fact that no testimony was presented bearing more specifically on his mental state on the day of the crime is attributable solely to the State's unconstitutional refusal to provide the means for him to be examined on that subject by even a single psychiatrist or psychologist.

Respondent now contends that the psychiatric examination given to Ake to determine his competency to stand trial somehow provided whatever psychiatric examination may have been necessary on the question of his sanity at the time of the crime. Opposition at 6-7. But the State did not sing that tune at trial. Rather, it emphasized to the jury, during the examination of the medical witnesses and in closing argument, that the psychiatrists who had examined Ake could not testify about Ake's mental state on the day of the crime. Tr. 564, 566, 584, 597, 602, Pet. App. 34, 36, 45, 49, 51. This was true at the trial and it remains true: Ake was never examined with respect to his mental condition at the time of the crime.

II. Petitioner's Constitutional Claims were Adequately Preserved.

Respondent suggests that both questions presented in the petition for certiorari were waived below. Opposition at 8-10. To the contrary, they were adequately preserved.

A. The Denial of Psychiatric Examination. At a pre-trial conference, defense counsel notified the court of defendant's intention to plead not guilty by reason of insanity. Counsel also moved, in view of defendant's indigency, for the provision of even "a meagre amount of funds" to retain a psychiatrist or, alternatively, for the appointment of a psychiatrist to examine Ake with respect to his sanity at the time of the crime. Tr. 19-25, Pet. App. 26-32. Counsel specifically articulated the constitutional claim at that time, arguing to the court that "under the constitution [defendant] is entitled to monies for a psychiatrist as if he were another Cullen Davis who had the money to pay for it." Tr. 19, Pet. App. 26. The court denied the motion, relying on United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953) for the proposition that a State has no constitutional duty to provide such an examination for indigent defendants. Tr. 24, Pet. App. 31.

On appeal, Ake contended that "he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist . . . as incident to his constitutional rights" Ake v. State, 633 P.2d at 6, Pet. App. 6. The Court of Criminal Appeals considered and rejected this claim on the merits, following a consistent line of Oklahoma decisions holding that "the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes." Id., and see Irvin v. State, 617 P.2d 583 (Okla. Cr. App. 1980) and cases cited therein.

Respondent calls attention to the fact that this claim was not listed in defendant's motion for a new trial, filed in the trial court one day after the jury's verdict, and argues that the claim was therefore waived. Opposition at 8-9. That contention is without merit. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." Raley v. Ohio, 360 U.S. 423, 436 (1959). Where, as here, the highest state court "reached and decided" the federal question, "[t]hat is sufficient." Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

B. The Drugging During Trial. The State does not argue, for it could not, that petitioner's claim with respect to being drugged at trial was not preserved on appeal. See Motion for New Trial ¶¶ 8, 10 (Appendix 4 to Opposition); Ake v. State, 633 P.2d at 6-7, Pet. App. 6-7. Rather, it argues that the point was waived in the trial court. Respondent's reasoning seems to be that because defense counsel waived a pre-trial hearing on "present sanity," Ake's heavily sedated, zombie-like state during the trial could not be considered by the trial court on the motion for a new trial or by an appellate court. Opposition at 9-10.

The Oklahoma Court of Criminal Appeals found, to the contrary, that Ake's "refusal [or inability] to communicate with his attorneys was brought to the attention of the trial judge." 633 P.2d at 7, Pet. App. 7 (emphasis added). The state appellate

court saw no obstacle to its consideration of this issue on appeal, and dealt with it at some length. 633 P.2d at 6-8, Pet. App. 6-8. Since the issue was preserved in the motion for a new trial, and was raised in and addressed on the merits by the state appellate court, it is properly before this Court. Raley v. Ohio, supra; Jenkins v. Georgia, supra.

III. This Case Merits Plenary Review.

Respondent does not deny the importance of the issues presented for review. This Court has previously granted certiorari on the question whether a state is constitutionally required to provide expert psychiatric assistance to an indigent defendant whose sanity at the time of the offense is substantially in dispute. Bush v. Texas, 372 U.S. 586 (1963). However, the question was never decided because that case was remanded upon Texas' offer, at oral argument, to provide the defendant with a new trial at which psychiatric evidence would be presented. Id.

As noted above, the trial court in this case relied on United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), in denying petitioner's request for psychiatric assistance. The State of Oklahoma continues to rely on that decision in this Court. Opposition at 8. Other states follow the same policy. See Petition for Certiorari at 14. But in Baldi a court-appointed psychiatrist did examine the defendant as to his mental state at the time of the crime, and testified on that subject at trial. 344 U.S. at 568. This fact appears to have been crucial to the Court's holding that no further psychiatric assistance was due to the defendant. Id. To the extent, if any, that Baldi stands for the proposition that there is "no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense," Opposition at 8, a number of federal and state courts have recognized that it "was severely undercut by the Court's decision in Griffin v. Illinois, [351 U.S. 12 (1956)]." Pedrero v. Wainwright, 590 P.2d 1383, 1390 n. 6 (5th Cir. 1979).

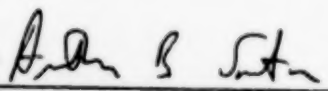
In the Baldi case both the majority and the dissent quoted with approval the Pennsylvania Supreme Court's statement that it is "a principle imbedded in the common law . . . that no insane person can be . . . executed." 344 U.S. at 569, 571. It is time for this Court to enforce that principle, and to make it clear to the states that they may not railroad insane indigent defendants to their deaths by failing to provide them with the necessary means to prove their insanity to the judge and jury.

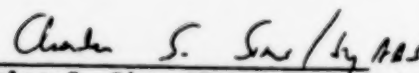
In this case, an indigent defendant displaying obvious signs of severe and long-standing mental illness at arraignment and at trial was denied any psychiatric examination directed to his sanity at the time of the crime. He was convicted after a one-day trial, and was sentenced to death. This case provides an appropriate occasion for the Court to consider this important constitutional issue.

Conclusion

For the reasons given above and in the Petition for a Writ of Certiorari, the Writ should be granted in this case.

Respectfully submitted,


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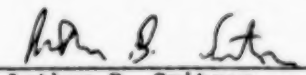

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November 30, 1983

Certificate of Service

I hereby certify that one copy of the foregoing Petitioner's Reply Brief was served by United States mail, first-class postage prepaid, upon counsel of record for respondent, David W. Lee, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this 30th day of November, 1983. I further certify that all parties required to be served have been served.


Arthur B. Spitzer

MOTION FILED
JUN 1 - 1984

No. 83-5424

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

GLEN BURTON AKE,
Petitioner

v.

STATE OF OKLAHOMA,
Respondent

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE AND
BRIEF FOR THE NEW JERSEY DEPARTMENT
OF THE PUBLIC ADVOCATE AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

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NO. 83-5424

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

GLEN BURTON AKE,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent,

MOTION FOR LEAVE TO FILE
A BRIEF AS AMICUS CURIAE

The New Jersey Department of the
Public Advocate¹ (Department) respectfully moves this Court for leave to file

¹ The Department is specifically empowered to "represent the public interest in such administrative and court proceedings as the Public Advocate (Footnote continued on next page)"

the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained; the attorney for the respondent has neither consented to nor opposed the Department's request.

The Department, an independent and unique executive agency of New Jersey state government, N.J.S.A. 52:27E-2, has, for almost ten years, litigated extensively in major areas affecting "the public interest." During this period,

(Footnote 1 continued)
deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30. Within the Department, the Division of Mental Health Advocacy (Division) was established to represent "indigent mental hospital admittees" in individual matters involving their admission to, retention in, or release from "mental hospitals," N.J.S.A. 52:27E-24, and to represent such persons in class actions on "an issue of general application to them," N.J.S.A. 52:27E-25.

the Department has participated in a wide variety of proceedings involving issues relating to housing, utility regulation, employment, the environment and the rights of the mentally handicapped.²

2

The Division has litigated one case to this Court, see Rennie v. Klein 653 F. 2d 836 (3 Cir. 1981), vacated -- U.S. --, 102 S. Ct. 3506 (1982), on remand 720 F. 2d 266 (3 Cir. 1983), and has filed amicus briefs in three other cases involving mental health issues within its relevant experience and expertise. Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1979), Jones v. United States, -- U.S. --, 103 S. Ct. 3043 (1983).

The Office of the Public Defender (Office), see N.J.S.A. 2A:158A-1 et seq., which is administratively housed in the Department and provides criminal defense services to all indigent persons in the State charged with indictable offenses, provided representation in this Court of respondent in Stickland v. Washington, -- U.S. --, 52 U.S.L.W. 4565 (1984).

The interest of the Department in this case arises from its long-term representation of persons charged with crime whose mental state is at issue,³ of institutionalized persons who wish to refuse the involuntary imposition of certain forms of powerful psychotropic medications,⁴ and of persons facing involuntary civil commitment.⁵ The

³ See, e.g., State v. Fields, 77 N.J. 282, 390 A. 2d 574 (1978) (right of insanity acquittees to periodic review of commitments); State v. Khan, 175 N.J. Super. 72, 417 A. 2d 585 (App. Div. 1980) (right to contemporaneous competency determination prior to imposition of insanity defense over defendant's objections); In re A.L.U., 192 N.J. Super. 480, 471 A. 2d 63 (App. Div. 1984) (further articulation of periodic review rights of insanity acquittees).

⁴ See Rennie, *supra*. This Court has recently acknowledged that the liberty interests of involuntarily committed mental patients "are implicated by the involuntary administration of antipsychotic drugs." Mills v. Rogers, 457 U.S. 291, 299 n. 16 (1982).

⁵ See, e.g., In re Geraghty, 68 N.J. 209, 343 A. 2d 737 (1975) (promulgation of court rule mandating appointment of counsel at (Footnote continued on next page)

Court's decision in the instant case will directly affect this Department's clientele on a wide range of issues involving insanity defense determinations, the right to effective counsel, and the right to be free from the unwanted imposition of powerful medical treatment.

The Department seeks leave to file its brief in order to augment the views presented by the parties on the central issues in this case, namely: (1) the right of an indigent criminal defendant to independent medical expertise in furtherance of an asserted defense of insanity; and (2) the prejudicial effect to petitioner of the administration of psycho-

(Footnote 5 continued)
all commitment hearings); In re Alfred, 137 N.J. Super. 20, 347 A. 2d 537 (App. Div. 1975) (scope of right of person facing commitment to appointment of independent psychiatric evaluation at county expense).

tropic medication through the course of his trial, to an extent which affected his demeanor and ability to communicate during his trial.

To the best of our knowledge, no other amicus or party in this case will deal with these matters from the same perspective as this Department has.

For the above reasons, the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

JOSPEH H. RODRIGUEZ
Public Advocate

By: Laura M. Le Winn
LAURA M. LE WINN*
Acting Director,
Division of Mental
Health Advocacy
MICHAEL L. PERLIN
Special Counsel to the
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*Counsel of Record

No. 83-5424

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

GLEN BURTON AKE,
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V.

STATE OF OKLAHOMA,
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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF <u>AMICUS CURIAE</u>	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. ACCESS TO THE ASSISTANCE OF INDEPENDENT PSYCHIATRIC EXPERTISE IS INDISPENSABLE TO A MEANINGFUL ASSERTION OF AN INSANITY DEFENSE	6
A. The Role Of Independent Medical Experts On Behalf Of Criminal Defendants Asserting An Insanity Defense At Trial, Is Of Historical Origins	6
B. Failure to Afford A Criminal Defendant An Independent Expert In Furtherance Of A Prof- ferred Insanity Defense Vitiates The Adversarial Process Which Is The Hallmark Of A Full And Fair Trial	19
II. THE INVOLUNTARY MEDICATION OF PETITIONER WITH THORAZINE, AFFECTING HIS Demeanor AND ABILITY TO COMMUNICATE DURING TRIAL, VIOLATED DUE PROCESS AND EQUAL PROTEC- TION RIGHTS	47

A. The Known Properties Of Thorazine And Its Probable Effects On Petitioner.....	47
B. The Relevant Caselaw And Other Authorities Support Petitioner's Arguments Against His Drugging	56
CONCLUSION	65

TABLE OF AUTHORITIES

CASES	Page
<u>Adams v. United States ex rel McCann</u> , 317 U.S. 269 (1942) ...	21
<u>Addington v. Texas</u> , 441 U.S. 418 (1979)	41
<u>Ake v. Oklahoma</u> , 663 P. 2d 1 (Okla. Ct. Crim. App. (1983))..	28, 48, 63
<u>Anderson v. State of Arizona</u> , 663 P. 2d 570 (Ariz. Ct. App. 1983).....	53
<u>Barefoot v. Estelle</u> , -- U.S. --, 103 S. Ct. 3383 (1983)	41
<u>Brinks v. Alabama</u> , 465 F. 2d 446 (5 Cir. 1982), cert. den. 409 U.S. 1130 (1983), reh. den. 410 U.S. 960 (1983)....	24, 27
<u>Chesney v. Adams</u> , 377 F. Supp. 887 (D. Conn. 1974)	50
<u>Commonwealth v. Louraine</u> , 390 Mass. 28, 453 N.E. 2d 437 (S.J. Ct. 1983)	57, 58
<u>Davis v. Hubbard</u> , 506 F. Supp. 915 (N.D. Ohio 1980)	53
<u>Davis v. United States</u> , 160 U.S. 469 (1895)	16, 17
<u>Eddings v. Oklahoma</u> , -- U.S. --, 102 S. Ct. 869 (1982)	28
<u>Ellis v. United States</u> , 484 F. Supp. 4 (D.S.C. 1975).....	50

TABLE OF AUTHORITIES--Continued

	Page
<u>Estelle v. Smith</u> , 451 U.S. 454 (1981)	23, 24, 38
<u>Estelle v. Williams</u> , 425 U.S. 501 (1976)	61
<u>G.D. Searle & Co. v. Institutional Drug Distributors</u> , 141 F. Supp. 838 (D.C. Cal. 1955)	49
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963)	19
<u>Hadfield's Case</u> , 27 Howell St. Tr. 1281 (K.B. 1800)	11
<u>Hansford v. United States</u> , 365 F. 2d 920 (D.C. Cir. 1966 ..	56
<u>Illinois v. Allen</u> , 397 U.S. 337 (1970)	61, 63
<u>In re Alfred</u> , 137 N.J. Super. 20, 347 A. 2d 537 (App. Div. 1975)	3
<u>In re A.L.U.</u> , 192 N.J. Super. 480, 471 A. 2d 63 (App. Div. 1984)	2
<u>In re Geraghty</u> , 68 N.J. 209, 343 A. 2d 737 (1975)	3
<u>In re K.K.B.</u> , 609 P. 2d 747 (Okla. Sp. Ct. 1980).....	53

-v-

TABLE OF AUTHORITIES --Continued

	Page
<u>In re Pray</u> , 133 Vt. 253, 336 <u>A. 2d</u> 174 (1975)	57, 58
<u>Jamison v. Farabee</u> , No. C-78- 0445-WHO N.D. Calif. (Consent Order filed April 26, 1983) ..	53
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938)	19
<u>Jones v. U.S. -- U.S. --</u> , 103 <u>S. Ct.</u> 3043 (1983)	50
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	28
<u>Loe v. United States</u> , 545 <u>F. Supp.</u> 662 (E.D. Va. 1982) ..	24
<u>Matlock v. Rose</u> , -- F. 2d -- (6 Cir. April 9, 1984)	37
<u>McMann v. Richardson</u> , 397 U.S. 759 (1970)	19
<u>Mills v. Rogers</u> , 457 U.S. 291 (1982)	2, 50, 58
<u>M'Naghten's Case</u> , 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843)	14, 16
<u>Morissette v. United States</u> , 342 <u>U.S.</u> 246 (1952)	7

-vi-

TABLE OF AUTHORITIES--Continued

	Page
<u>Noggle v. Marshall</u> , 706 F. 2d 1408 (6 Cir. 1983), <u>cert.</u> <u>den. -- U.S. --</u> , 104 <u>S. Ct.</u> 530 (1983)	40
<u>People v. Ackles</u> , 304 P. 2d 1032 (C.A. 3rd Dis. Calif. 1956)	49
<u>Peters v. State</u> , 516 P. 2d 1373 (Okla. Cr. 1973)	63
<u>Porter v. Estelle</u> , 709 F. 2d 944 (5 Cir. 1983), <u>cert. den.</u> <u>sub nom. Porter v. McKaskle</u> , -- U.S. --, 52 U.S.L.W. 3825 (1984)	26
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932)	19, 21, 42
<u>Project Release v. Prevost</u> , 722 <u>F. 2d</u> 960 (2 Cir. 1983) ..	53
<u>Regina v. Oxford</u> , 9 Car. & P. 525 (N.P. 1840)	13
<u>Rennie v. Klein</u> , 462 F. Supp. 1131 (D.N.J. 1979)	52, 54
<u>Rennie v. Klein</u> , 476 F. Supp. 1294 (D.N.J. 1979)	53
<u>Rennie v. Klein</u> , 653 F. 2d 836 (3 Cir. 1981), <u>vacated, --</u> <u>U.S. --</u> , 102 S. Ct. 3506 (1982), <u>on remand</u> 720 F. 2d 266 (3 Cir. 1983)	2

-vii-

TABLE OF AUTHORITIES--Continued
Page

<u>Rennie v. Klein</u> , 720 F. 2d 266 (3 Cir. 1983)	2, 62
<u>Rivera v. Franzen</u> , 33 Crim. L. Rptr. 2276 (N.D. Ill. May 27, 1983)	24
<u>Rogers v. Commissioner of Mental Health</u> , 390 Mass. 489, 458 N.E. 2d 308 (S.J. Ct. 1983)	53, 57
<u>Rogers v. Okin</u> , 478 F. Supp. 1342 (D. Mass. 1979)	53
<u>Ruiz v. Estelle</u> , 503 F. Supp. 1265 (S.D. Tex. 1980), 650 F. 2d 555 (5 Cir. 1982), 666 F. 2d 854 (5 Cir. 1982), 679 F. 2d 1115 (5 Cir. 1982), 688 F. 2d 266 (5 Cir. 1982), cert. den. -- U.S. --, 103 S. Ct. 1438 (1983)	50
<u>Sanders v. U.S.</u> , 373 U.S. 1 (1963)	56
<u>Scott v. Plante</u> , 532 F. 2d 939 (3 Cir. 1976), 641 F. 2d 119 (3 Cir. 1981), vac. and rem. 458 U.S. 1101 (1982), on remand 691 F. 2d 634 (3 Cir. 1982)	55
<u>State v. Fields</u> , 77 N.J. 282, 390 A. 2d 574 (1978)	2
<u>State v. Hamilton</u> , 441 So. 2d 1192 (La. S. Ct. 1983)	28, 40

-viii-

TABLE OF AUTHORITIES--Continued
Page

<u>State v. Khan</u> , 175 N.J. Super. 72, 417 A. 2d 585 (App. Div. 1980)	2
<u>State v. Kociolek</u> , 23 N.J. 400, 129 A. 2d 417 (1957) ..	40
<u>State v. Maryott</u> , 6 Wash. App. 96, 492 P. 2d 239 (1971) ...	57, 58, 61
<u>State v. Murphy</u> , 56 Wash. 2d 761, 355 P. 2d 323 (1960)	57, 58
<u>State v. Noel</u> , 102 N.J.L. 659, 133 A. 274 (E.&A. 1926)	27
<u>State v. Spencer</u> , 21 N.J.L. 196 (O.&T. 1846)	17
<u>Stone v. Smith, Kline & French</u> , No. 82-7232, slip opinion, (11 Cir. May 14, 1984)	51
<u>Strickland v. Washington</u> , -- U.S. --, 52 U.S.L.W. 4565 (1984). 20, 22, 40	
<u>Suzuki v. Quisenberry</u> , 411 F. Supp. 1113 (D. Haw. 1976)	61
<u>United States v. Alvarez</u> , 519 F. 2d 1036 (3 Cir. 1975) ...	38
<u>United States v. Bass</u> , 477 F. 2d 723 (9 Cir. 1975)	34, 36
<u>United States v. Brawner</u> , 471 F. 2d 969 (D.C. Cir. 1972) ..	7

TABLE OF AUTHORITIES--Continued
Page

<u>United States v. Caldwell</u> , 543 F. 2d 1333 (D.C. Cir. 1975), cert. den. 423 U.S. 1087 (1976)	34, 37
<u>United States v. Chavis</u> , 476 F. 2d 1137 (D.C. Cir. 1973) ..	34
<u>United States v. Currens</u> , 290 F. 2d 751 (3 Cir. 1961)	16
<u>United States v. Durant</u> , 545 F. 2d 823 (2 Cir. 1976)	35
<u>United States v. Schultz</u> , 431 F. 2d 907 (8 Cir. 1970)	30, 31, 35, 36
<u>United States v. Taylor</u> , 437 F. 2d 371 (4 Cir. 1971)	37
<u>United States v. Theriault</u> , 440 F. 2d 713 (5 Cir. 1971), cert. den. 411 U.S. 984 (1983)	32, 33 36
<u>United States v. Tucker</u> , 716 F. 2d 576 (9 Cir. 1983)	23
<u>United States v. Wilson</u> , 471 F. 2d 1072 (D.C. Cir. 1982) cert. den. 410 U.S. 957 (1973)	51
<u>Vitek v. Jones</u> , 445 U.S. 480 (1980)	50
<u>Washington v. Texas</u> , 388 U.S. 14 (1967)	29
<u>Washington v. United States</u> , 390 F. 2d 444 (D.C. Cir. 1967) ..	18

TABLE OF AUTHORITIES--Continued
Page

<u>Whitehead v. Wainwright</u> , 447 F. Supp. 898 (M.D. Fla. 1978). vac. and rem. 609 F. 2d 223 (5 Cir. 1980)	56
<u>Wood v. Zahradnick</u> , 430 F. Supp. 107 (E.D. Va. 1977), aff'd 578 F. 2d 980 (4 Cir. 1978), further proceedings at 611 F. 2d 1383 (4 Cir. 1980)	24
STATUTES	
18 U.S.C. §3006A(e)	29, 30, 33, 36, 39
18 U.S.C. §4244	33, 39
P.L. 91-447, §1, Oct. 14, 1970	30
CONSTITUTIONAL PROVISIONS	
<u>United States Constitution</u> , Amendment V	22
<u>United States Constitution</u> , Amendment VI	19, 20, 21, 22, 24, 26, 38
<u>United States Constitution</u> , Amendment XIV	19
OTHER AUTHORITIES	
Ayd, "A Survey of Drug Induced Extrapyramidal Reactions," 175 J.A.M.A. 1054 (1961)	48

TABLE OF AUTHORITIES--Continued

	Page
Biggs, <u>The Guilty Mind</u> (1955)	9
Birley, <u>Marcus Aurelius</u> (1966)	9
Block, "The Semantics of Insanity," 36 <u>Okla. L. Rev.</u> 561 (1983)	16
2H. Bracton, <u>De Legibus Et</u> <u>Consuetudinibus Angliae</u> (S. Thorne Trans. 1968)	8
Broom, <u>A Selection of Legal</u> <u>Maxims</u> (London 1845)	9
Burt and Morris, "A Proposal for Abolition of the In- competency Plea," 40 <u>U. Chi. L. Rev.</u> 66 (1972) ..	61
Bushman and Reed, "Tranquilizers and Competency to Stand Trial," 54 <u>A.B.A.J.</u> 284 (1968)	58, 59
Cameron and Wimer, "An Anti- cholinergic Toxicity Reaction to Chlorpromazine Activated by Psychological Stress," 167 <u>J. Nerv. & Ment. Dis.</u> 508 (1979)	52
Coke, <u>The First Part of the</u> <u>Institutes of the Laws of</u> <u>England, or a Commentary</u> <u>Upon Littleton</u> (17th ed. 1817)	9

TABLE OF AUTHORITIES--Continued

Page

Diamond, "Isaac Ray and the Trial of Daniel M'Naghten," 112 <u>Am. J. Psych.</u> 651 (1956) ...	15
Deniker, "Impact of Neuroleptic Chemotherapies on Schizophrenic Psychoses," 135 <u>Am. J. Psych.</u> 923 (1978)	52
Detre and Jarecki, <u>Modern</u> <u>Psychiatric Treatment</u> (Lippincott, 1971)	50
"Developments in the Law: Civil Commitment of the Mentally Ill," 87 <u>Harv. L. Rev.</u> 1190 (1974)	61
Ennis and Litwack, "Psychiatry and the Presumption of Ex- pertise: Flipping Coins in the Courtroom," 62 <u>Calif.</u> <u>L. Rev.</u> 693 (1974)	44, 45
Ferleger, "Loosing the Chains: In-Hospital Civil Liberties of Mental Patients," 13 <u>Santa Clara Law.</u> 447 (1973) ..	61
Goldberg and Breznitz, eds., <u>Handbook of Stress: Theoretical</u> <u>and Clinical Aspects</u> (1983)	53
Golten, "Role of Defense Counsel in the Criminal Commitment Process," 10 <u>Am. Crim. L.</u> <u>Rev.</u> 385 (1972)	43, 44
Group for the Advancement of Psychiatry, <u>Misuse of Psychiatry</u> <u>In the Criminal Courts:</u> <u>Competency to Stand Trial</u> February, 1974)	59

TABLE OF AUTHORITIES--Continued

	Page
Guttmacher, <u>The Mind of the Murderer</u> (1960)	10
Haddox, Gross and Pollack, "Mental Competency to Stand Trial While Under the Influence of Drugs," 7 <u>Loyola L.A.L.R.</u> 425 (1974) ..	60
Haddox and Pollack, "Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial), 17 <u>J. For. Sci.</u> 568 (1972)	60
1 Hale, <u>The History of the Pleas of the Crown</u> (London 1736) ..	9
Halleck, "American Psychiatry and the Criminal: A Historical Review," 1 Rieber and Vetter (eds.), <u>The Psychological Foundations of Criminal Justice</u> (1978)	11
Halleck, "The Role of the Psychiatrist in the Criminal Justice System," <u>Psychiatry 1982 Annual Review</u> , 386 (1982) ...	17
Hartley and Couper-Smartt, "Paradoxical Effects in Sleep and Performance of Two Doses of Chlorpromazine," 58(2) <u>Psychopharmacology</u> 201 (1978)	55

TABLE OF AUTHORITIES--Continued

	Page
Hartley, Couper-Smartt and Henry, "Behavioral Antagonism Between Chlorpromazine and Noise in Man," 55 <u>Psychopharmacology</u> 97 (1977) ..	52
Hawkins, <u>A Treatise of the Pleas of the Crown</u> (London 1739)	9
Hermann and Sor, "Convicting of Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittes," [1983] <u>Brig. Young L. Rev.</u> 499	10
Hollister, "Adverse Reactions to Phenothiazines" 189 <u>J.A.M.A.</u> 311 (1964)	48
<u>Insanity Defense and Related Criminal Procedure Matters</u> , H. Rep. No. 98-577, 98th Cong. 1st Sess. (1983)	3
Kinross-Wright, "The Current Status of Phenothiazines," 200 <u>J.A.M.A.</u> 461 (1967)	48
Kolb and Brodie, <u>Modern Clinical Psychiatry</u> , (10th Ed. 1982)	52

TABLE OF AUTHORITIES--Continued

	Page
McBain, "The Insanity Defense: Conceptual Confusion and the Erosion of Fairness," 67 <u>Marquette L. Rev.</u> 1 (1983)...	3
National Commission on the <u>Insanity Defense, Myths and Realities</u> (1982)	3
Perlin and Sadoff, "Ethical Issues in the Representation of Individuals in the Commit- ment Process," 45 <u>L. & Contemp. Prob.</u> 161 (1983)	43
<u>Physicians' Desk Reference</u> (1984 ed.)	48
Plucknett, <u>A Concise History of the Common Law</u> (5th ed. 1956)	8
Poythress, "Mental Expert Testimony," 5 <u>J. Psychiatry & L.</u> 201 (1977)	44, 45
Poythress, "Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony," 2 <u>L. & Hum. Behav.</u> 1 (1978) ...	42
Quen, "An Historical View of the M'Naghten Trial," 1 Rieber and Vetter (eds.), <u>The Psychological Foundations of Criminal Justice</u> (1978)	15

TABLE OF AUTHORITIES--Continued

	Page
Ray, <u>A Treatise on the Medical Jurisprudence of Insanity</u> (19838)	15, 54
Rodriguez, LeWinn and Perlin, "The Insanity Defense Under Seige: Legislative Assaults and Legal Rejoinders," 14 <u>Rutgers L. J.</u> 397 (1983)	3
Scrignar, "Tranquilizers and the Psychhotic Defendant," 53 <u>A.B.A.J.</u> 43 (1967)	58
Simon, "The Defense of Insanity," 11 <u>J. Psychiatry & L.</u> 183 (1983).....	10
Simon, <u>The Jury and the Defense Of Insanity</u> (1967)	10
2 <u>The Civil Law</u> (S. Scott ed. 1973).....	9
2 <u>U.S. Cong. & Admin. News</u> 2993 (1964)	31
Van Putten and May, "'Akinetic Depression' in Schizophrenia," 35 <u>Arch. Gen. Psych.</u> 1101 (1978)	55
Weihsfen, <u>Mental Disorder As A Criminal Defense</u> (1954)	9
Winick, "Psychotropic Drugs And Competence to Stand Trial," 1979 <u>Am. Bar Fndtn. Res.</u> <u>J.</u> 769 (1979)	49, 59

TABLE OF AUTHORITIES--Continued

	Page
Winsberg and Yepes, "Anti- psychotics (Major Tranquilizers, Neuroleptis)" in Werry ed., <u>Pediatric Psychopharmacology: The Use of Behavior Modifying Drugs in Children</u> , (1978) ...	62
Ziskin, <u>Coping With Psychiatric and Psychological Testimony</u> (3d ed. 1981)	45, 46

STATEMENT OF INTEREST

The interest of the New Jersey Department of the Public Advocate in this case arises from its long-term representation of persons charged with crime whose mental state is at issue,¹ of institutionalized persons who wish to refuse the involuntary imposition of certain forms of powerful psychotropic medications,² and of persons facing

1

See, e.g., State v. Fields, 77 N.J. 282, 390 A. 2d 574 (1978) (right of insanity acquittees to periodic review of commitments); State v. Khan, 175 N.J. Super. 72, 417 A.2d 585 (App. Div. 1980) (right to contemporaneous competency determination prior to imposition of insanity defense over defendant's objections). In re A.L.U., 192 N.J. Super. 480, 471 A. 2d 63 (App. Div. 1984) (further articulation of periodic review of rights of insanity acquittees).

2

See, Rennie v. Klein, 653 F. 2d 836 (3 Cir. 1981), vacated -- U.S. --, 102 S. Ct. 3506 (1982), on remand 720 F. 2d 266 (3 Cir. 1983). This Court has recently acknowledged that the liberty interests of involuntarily committed mental patients "are implicated by the involuntary administration of anti-psychotic drugs." Mills v. Rogers, 457 U.S. 291, 299 n. 16 (1982).

involuntary civil commitment.³ The Court's decision in the instant case will directly affect this Department's clientele on a wide range of issues involving insanity defense determinations,⁴ the right to effective counsel, and the right to be free from the unwanted imposition of powerful medical treatment.

³ See, e.g., In re Geraghty, 68 N.J. 209, 343 A. 2d 737 (1975) (promulgation of court rule appointment of counsel at all commitment hearings); In re Alfred, 137 N.J. Super. 20, 347 A. 2d 537 (App. Div. 1975) (scope of right of person facing commitment to appointment of independent psychiatric evaluation at county expense).

⁴ The Department's concern for -- and advocacy on behalf of -- various issues generated by the ongoing public debate on the very concept of the insanity defense, has been reflected on a national scale. See, e.g., National Commission on the Insanity Defense, Myths and Realities 15 (1982); Insanity Defense and Related Criminal Procedure Matters, H. Rep. No. 98-577, 98th Cong. 1st Sess., 5-6 n. 7-8, 10-11 (1983). See also Rodriguez, LeWinn, and Perlin, "The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders," 14 Rutgers L. J. 397 (1983); McBain, "The Insanity Defense: Conceptual Confusion and the Erosion of Fairness," 67 Marquette L. Rev. 1, 4 n. 15, 7-9 n. 29 (1983).

SUMMARY OF ARGUMENT

In criminal trials at which the question of defendant's mental capacity at the time of commission of the alleged offense is raised in defense, access by such defendant to independent psychiatric experts is essential both to aid in presentation of the defense and to rebut evidence which may be offered in opposition by the prosecution. The critical role played by such experts in these proceedings is well-established and has long-standing historical roots.

A defendant's right to access to independent experts in insanity trials inheres in his very ability to obtain effective assistance of counsel and a fair trial. An indigent defendant, therefore, is entitled to appointment of such an independent expert on his behalf, by authorization of the court.

The very nature of psychiatric expertise itself requires that parties to the proceedings be adequately equipped to subject such evidence to rigorous adversarial testing.

With respect to the issue of the administration of psychotropic medication during his trial, amicus contends that such a practice was inherently prejudicial to petitioner. The medication in question, Thorazine, affected his demeanor and capacity to communicate. As such it deprived him of his ability to participate in his trial and to control his appearance before the jury. In light of these severe consequences, petitioner should at least be afforded the protection of a pre-trial hearing at which the need for such medication would be the core inquiry.

ARGUMENT

I.

ACCESS TO THE ASSISTANCE OF
INDEPENDENT PSYCHIATRIC
EXPERTISE IS INDISPENSABLE TO
A MEANINGFUL ASSERTION OF
AN INSANITY DEFENSE

A. The Role Of Independent
Medical Experts On Behalf Of
Criminal Defendants Asserting
An Insanity Defense At Trial
Is Of Historical Origins

The questions of criminal intent and blameworthiness form the core inquiry into the susceptibility to punishment of an individual charged with the commission of a crime. Consideration of criminal intent is based on the assumption that a person has the capacity to choose between right and wrong, that he has a sense of wrongdoing. "The concept of 'belief in freedom of the human will and of consequent ability and duty of the normal individual to choose between good and evil' is a core concept that is 'universal and persistent in mature systems of law.'"

United States v. Brawner, 471 F. 2d 969, 985 (D.C. Cir. 1972), quoting Morrisette v. United States, 342 U.S. 246, 250 (1952).

In this regard, the insanity defense has been a major component of Anglo-American jurisprudence for over 700 years.⁵ Concomitantly, the role of expert

⁵

The insanity defense has been in existence since at least the twelfth century.

But what shall we say of a madman bereft of reason? And of the deranged, the delirious and mentally retarded? Or if one labouring under a high fever drowns himself or kills himself? Quaere whether such a one commits felony de se. It is submitted that he does not, nor do such persons forfeit their inheritance or their chattels, since they are without sense and reason and can no more commit an injuria or a felony than a brute criminal since they are not far removed from brutes as is evident in the case of a minor, for if he should kill another while under age he would not suffer judgment. [That a madman is not liable is true, unless he acts under pretense of madness while enjoying (Footnote continued on next page)

medical witnesses in insanity trials has long-standing historical roots.

(Footnote 5 continued)

lucid intervals].

2H. Bracton, De Legibus Et Consuetudinibus Angliae 424 (c. 1250) (S. Thorne Trans. 1968).

Before Bracton, the sources of the insanity defense at common law can be traced at least to the Roman legal authorities that influenced Bracton. See generally, Plucknett, A Concise History of the Common Law 261-62 (5th ed. 1956). For example, in the Digests (or Pandects) of Justinian first published in A.D. 533, the following commentary on the insanity defense appears in an imperial "rescript" issued by the brother emperors Marcus Aurelius (A.D. 120-180) and Commodus (A.D. 161-192) during the period of their joint reign (A.D. 177-180);

If it is positively ascertained by you that Aelius Perscus is to such a degree insane that, through his constant alienation of mind, he is void of all understanding, and no suspicion exists that he was pretending insanity when he killed his mother, you can disregard the manner of his punishment, since he has already been sufficiently punished by his insanity; still, he should be placed under careful restraint, and, if you think proper, even be placed in chains; as this has reference not so much to his punishment as to his own protection and the safety of his neighbors.

(Footnote continued on next page)

Like the insanity defense, the practice whereby the courts call in experts to advise them on matters not

(Footnote 5 continued)

If, however, as often happens he has intervals of sounder mind, you must diligently inquire whether he did not commit the crime during one of these periods, so that no indulgence should be given to his affliction; and, if you find that this is the case, notify Us, that We may determine whether he should be punished in proportion to the enormity of his offense, if he committed it at a time when he seemed to know what he was doing.

2 The Civil Law 259 (S. Scott ed. 1973) For another translation, see Birley, Marcus Aurelius 272-73 (1966).

The maxim derived from this Roman commentary -- furiosus solo furore punitur (a madman is punished by his madness alone) -- appears in numerous English cases and treatises on the insanity defense. See, e.g. Broom, A Selection of Legal Maxims 5 (London 1845); Coke, The First Part of the Institutes of the Laws of England, or a Commentary Upon Littleton 247b (17th ed. 1817). See also, 1 Hale, The History of the Pleas of the Crown 29-37 (London 1736); Hawkins, A Treatise of the Pleas of the Crown, 1-3 (London 1739); Biggs, The Guilty Mind 47-56, 81-88 (1955); Weihofen, Mental Disorder as a Criminal Defense (Footnote continued on next page)

generally known to the average person goes back a long time: in English courts, over four centuries. Initially, the experts were used as technical assistants to the court, rather than as witnesses. The judge summoned experts to inform him about technical matters; he then determined whether the information should be passed on to the jury. By the middle of the seventeenth century, when the finding of the facts had become the exclusive province of the jury, the practice of court-appointed experts reporting to the judge was abandoned; instead, the experts were called as witnesses by the parties involved in the dispute. Simon, "The Defense of Insanity" 11 J. Psychiatry & L. 183, 193 (1983).⁶

(Footnote 5 continued)

52-59 (1954); Simon, The Jury and The Defense of Insanity, 16-20 (1967); see generally Hermann and Sor, "Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees," [1983] Brig. Young L. Rev. 499, 506-515.

⁶ For an overview of the evolution of expert testimony in trials generally, see Guttmacher, The Mind of the Murderer 109-117 (1960) (hereinafter "Guttmacher"). ("By the last quarter of the seventeenth century the practice of employing partisan experts had become well established," id. at 112).

Since at least the beginning of the nineteenth century, "the search for biological explanations of deviant behavior has been unremitting. This is particularly true of that deviant behavior which is labelled as criminal." Halleck, "American Psychiatry and the Criminal: A Historical Review," in 1 Rieber and Vetter (eds.), The Psychological Foundations of Criminal Justice, 8 (1978) (hereinafter Psychological Foundations).

This development of medical involvement in issues of criminal responsibility is reflected in early nineteenth century cases such as Hadfield's Case, 27 Howell St. Tr. 1281 (K.B. 1800). The defendant, charged with high treason by virtue of his attempt to assassinate King George III, interposed a defense of insanity. Among the witnesses called on his behalf were: (1) Henry Cline, esq. [sic], described

by defense counsel, Lord Erskine, as "known to be one of the first anatomists in the world," id. at 1320; (2) Doctor Creighton, "a physician . . . [who had] applied particular attention to the disease of madness," id. at 1334; and (3) Mr. Lidderdale, described as "a surgeon," id. at 1335. Mr. Cline, the anatomist, testified to the possibility of brain damage sustained by the defendant from head wounds received in battle, as a result of which, "[i]t frequently happens . . . there is some derangement of the understanding." Id. at 1334. Dr. Creighton stated: "I have not the smallest doubt that he [defendant] is insane He is not a maniac, but he labours under mental derangement of a very common but particular kind." Id. at 1334. And the surgeon, Lidderdale, testified to having examined defendant

some four years earlier, "[i]n the spring of 1796, [when defendant was] brought in, in a state of insanity," and treating him with "bleeding, blistering, and cathartics." Id. at 1335-36. The jury returned a verdict of "Not Guilty: he being under the influence of Insanity at the time the act was committed." Id. at 1356.

Likewise, in Regina v. Oxford, 9 Car. & P. 525 (N.P. 1840) -- again involving a charge of high treason stemming from defendant's attempt to assassinate Queen Victoria -- "[s]everal eminent medical men were also called for the prisoner They all gave it as their decided opinion that he was of unsound mind." ⁷ Id. at 541. Here, too, the

⁷ A footnote to the opinion at the end of the above-quoted passage, states "no medical men were examined on the part of the prosecution, though it appeared that Mr. Maule, the solicitor to the Treasury (Footnote continued on next page)

jury found the prisoner "not guilty, he being insane at the time." Id. at 551.

In the landmark trial in M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843), the medical evidence -- adduced by witnesses "called on the part of the prisoner" 10 Cl. & F., supra, at 201 -- established that the defendant was "affected by morbid delusions" which carried him away beyond the power of his own control and left him no . . . [moral] perception [of right and wrong]." Id. No less than eight medical experts testified as to defendant's insanity; four specifically testified that his disease deprived him of control over his actions, and one, Dr. E.T. Monro, described the "type of thinking [which] is common in

(Footnote 7 continued)

was present at an interview which those who were examined for [i.e., called by] the prisoner, had with him in Newgate." Id. at 541, n. (a)¹.

paranoid schizophrenia." Quen, "An Historical View of the M'Naghten Trial," in Psychological Foundations, supra, at 93-94. Defense counsel made "extensive and almost exclusive reference to the work of the American physician, Isaac Ray,⁸ in his [counsel's] attempt to demonstrate that legally exculpable insanity should include more than disease of the intellect." Id. at 93.⁹

⁸ Ray is referred to as "the leader of forensic psychiatry in [the United States]," in Guttmacher, supra at 121. Writing nearly 150 years ago, Ray stressed the "utmost importance" of medical testimony at an insanity defense trial, Ray, A Treatise on the Medical Jurisprudence of Insanity (1838), §27 at 48, (Overholser ed. 1962), noting it was essential that such testimony be "founded on extraordinary knowledge and skill relative to the particular disease, insanity," Id., §28 at 50. M'Naghten's lawyer focused on Ray's writings on insanity in his summation to the jury. See Diamond, "Isaac Ray and the Trial of Daniel M'Naghten," 112 Am. J. Psych. 651, 652-654 (1956).

⁹

This attempt was apparently rejected by (Footnote continued on next page)

The M'Naghten trial had a galvanizing effect on the medico-legal concept of insanity:

Earlier, there was only a desultory interest in the medical jurisprudence of insanity among British physicians. The legal and Parliamentary reaction to the trial focused their attention and concern on this subject.

* * * *

In America, the M'Naghten Rules are still being debated. One result . . . [has been] the increased attention to the neuro-psychiatric aspects of criminality[.]" Id. at 96 [footnotes omitted].

While the rule of M'Naghten -- with respect to the proper legal definition of, or test for, insanity -- may have sparked debate, see, e.g., Davis v. United States, 160 U.S. 469, 479-80 (1895), United States v. Currens, 290 F. 2d 751

(Footnote 9 continued)

Chief Justice Tindal, who charged the jury essentially in terms of defendant's cognitive functioning. Quen, Psychological Foundations, supra at 94. See also, for further discussion of this point, Block, "The Semantics of Insanity," 36 Okla. L. Rev. 561, 562-65 (1983).

(3 Cir. 1961), the crucial role of medical experts in insanity trials has long been recognized. As at least one commentator has noted:

Psychiatric testimony in insanity cases serves three purposes: first, it supplies the court with facts concerning the offender's illness; second, it presents informed opinion concerning the nature of that illness; and third, it furnishes a basis for deciding whether the illness made the patient legally insane at the time of the crime under that jurisdiction's standards of insanity. Halleck, "The Role of the Psychiatrist in the Criminal Justice System," in Psychiatry 1982 Annual Review 386, 391 (1982).¹⁰

¹⁰

See, e.g., State v. Spencer, 21 N.J.L. 196, 208 (O. & T. 1846) (cited in Davis v. United States, 160 U.S. *supra* at 483), in which Chief Justice Horblower acknowledged the debt owed to medical experts by "the administrators of criminal law" in insanity defense trials, to wit:

I mean no disrespect to the learned writers on medical jurisprudence, or other distinguished men of the medical profession. On the contrary, I consider the administrators of criminal law greatly indebted to them for the results of their valuable experience, and professional discussions on the
(Footnote continued on next page)

As will be discussed further in Point IB, *infra*, in cases where an insanity defense is interposed to criminal charges, a defendant's access to independent medical expertise is, by now, inextricably intertwined with his very ability to obtain a fundamentally fair trial.

(Footnote 10 continued)

subject of insanity; and I believe those judges who carefully study the medical writers and pay the most respectful but discriminating attention to their scientific researches on the subject, will seldom, if ever, submit a case to a jury in such a way as to hazard the conviction of a deranged man.

See also, Washington, v. United States, 390 F. 2d 444 (D.C. Cir. 1967) for a thoughtful analysis by Chief Judge Bazelon of the need "in future cases to ensure that the issue of responsibility is decided upon sufficient information," *id.* at 451, and a discussion of how to render medical expert testimony more comprehensible to juries in criminal trials, *id.* at 454.

B. Failure To Afford A Criminal Defendant An Independent Expert In Furtherance Of A Proffered Insanity Defense Vitiates The Adversarial Process Which Is The Hallmark Of A Full And Fair Trial

This Court has long recognized that the right to counsel guaranteed by the Sixth Amendment to the Constitution is essential in order to protect a criminal defendant's fundamental right to a fair trial, Powell v. Alabama, 287 U.S. 45, 71 (1932); Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963), and that this fundamental right is applicable to the several states through the Fourteenth Amendment, Gideon, 372 U.S., supra at 341. Specifically, "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970).

Most recently, the standards by which the constitutionally adequate effectuation of this right should be measured were articulated by this Court in Strickland v. Washington, -- U.S. --, 52 U.S.L.W. 4565 (1984). There, in weighing a criminal defendant's claim of ineffective assistance of counsel in a capital case, the "benchmark" for judging such a claim was described by the Court as "whether . . . the trial cannot be relied upon as having produced a just result." Id. at 4570. The purpose of the Sixth Amendment guarantee was identified as "simply to ensure that criminal defendants receive a fair trial," and "to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings," id. at 4571. In assessing the inter-relationship between the various components

which comprise a "fair trial," the Court stated:

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. [citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275-76 (1942); and Powell v. Alabama, 287 U.S., supra at 68-69]. Id.

Referring specifically to the question of prejudice to a defendant from counsel's errors in the context of a capital case, the Court stated:

When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating

and mitigating circumstances did not warrant death. Id. at 4572

The Court then concluded that:

In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. Id. at 4573.¹¹

II

It is acknowledged that the "breakdown in the adversarial process" which concerned this Court in Strickland, supra, was bottomed on a claim of errors or deficiencies in trial counsel's performance which prejudiced the defense, 52 U.S.L.W. supra at 4570-71, whereas, in the instant case, the "breakdown" and "prejudice" claimed by defendant stem from actions or decisions of the trial judge. Notwithstanding this distinction, the Strickland concepts of a fair trial and "the adversarial system embodied in the Sixth Amendment," id. at 4570, are directly pertinent to a consideration of the claims here.

In short, the inquiry on appeal should focus broadly on whether the trial below constituted a "reliable adversarial testing process." Id. at 4570.

Application of these principles to the instant case leads directly to the conclusion that the trial proceedings at issue fell far short of the "reliable adversarial testing process" envisioned by this Court. By refusing to appoint an independent psychiatric expert to examine defendant with respect to his mental state at the time of the offense, the trial court effectively precluded him from adducing evidence of his one ostensibly viable defense, at both the guilt¹² and penalty¹³ phases of trial.

¹² Cf. United States v. Tucker, 716 F. 2d 576, 580 (9 Cir. 1983) (defense counsel was ineffective in failing to pursue and prepare adequately defendant's "only plausible theory of defense [which was] readily apparent.")

¹³ See, e.g., Estelle v. Smith, 451 U.S. (Footnote continued on next page)

Criminal convictions stemming from trial proceedings similar to those in the instant case, have consistently been overturned on appeal.¹⁴ See, for example, Brinks v. Alabama, 465 F. 2d

(Footnote 13 continued)

454, 472 (1981) ("A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty.")

¹⁴ In cases where a similar result ensued from error or inaction on the part of the defense attorney, criminal convictions have been reversed, on the grounds of ineffective assistance of counsel. For example, in Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977), aff'd 578 F. 2d 980 (4 Cir. 1978), further proceedings at 611 F. 2d 1383 (4 Cir. 1980), the trial lawyer's failure to obtain a mental examination of the defendant in aid of a viable insanity defense, was characterized by the court as "so below the standard of reasonable competence that it amounted to a deprivation of [defendant's] Sixth Amendment right to counsel." 578 F. 2d *supra* at 982. See also, Loe v. United States, 545 F. Supp. 662 (E.D. Va. 1982); and Rivera v. Franzen, 33 Crim. L. Rptr. 2276 (N.D. Ill. May 27, 1983), holding that a defendant who claims ineffective assistance of counsel due to his attorney's failure to investigate an insanity defense, does not have to show prejudice stemming from (Footnote continued on next page)

446 (5 Cir. 1972), cert. den. 409 U.S.
1130 (1973), reh. den. 410 U.S. 960
(1973), a case closely analogous to the
instant matter on the issue of a state
judge's refusal to order a pre-trial
sanity investigation pursuant to state
law. The court found, based on the facts
before it, that the trial court "exceeded
the allowable range of its discretion"
under Alabama law in denying a motion
for a pre-trial sanity hearing brought by
defendant's attorney based on evidence
consisting of letters from lay witnesses
and the attorney's personal opinion
that his client "appeared to be insane."
Id. at 447. The appellate court stated:

(Footnote 14 continued)

such failure in order to prevail on
appeal. The court stated: "This Court
would be awash in a sea of speculation
were it to make a determination that a
colorable insanity defense . . . could not
have persuaded a jury that the petitioner
was insane and therefore not legally
responsible for his actions." Id. at 2277.

[A]part from his claim that
the state arbitrarily denied him
a sanity investigation, Brinks
advances a second argument which
necessitates reversing his
conviction. Under the due process
and equal protection provisions
of the Fourteenth Amendment and
the Sixth Amendment's guarantee
of effective legal counsel,
Brinks contends that, because
of his indigency, he was unable
to secure expert testimony to
present to the state court before
it considered whether there was
enough evidence to order a sanity
investigation. Had he been
affluent, or had the state provided
him with funds, Brinks claims
he could have introduced evidence
which would have compelled a
sanity investigation.

* * * *

Under these circumstances, we fail
to see how Brinks could have
received adequate representation
from his appointed attorney.
Moreover, the main thrust of the
argument of petitioner's counsel
in this court is that he could not
adequately represent petitioner
because of the lack of an available
expert witness. Id. at 448
[footnote omitted].¹⁵

15

Cf. Porter v. Estelle, 709 F. 2d 944
(5 Cir. 1983), cert. den. sub nom.
Porter v. McKaskle, -- U.S. --, 52 U.S.L.W.
3825 (1984), where Justice Marshall,
dissenting from the denial of certiorari
in a capital case in which the trial court
(Footnote continued on next page)

As noted above, Brinks is strikingly similar to the instant case with respect

(Footnote 15 continued)

refused to order a psychiatric examination to determine defendant's competency to stand trial, stated:

[A] substantial body of both medical evidence and evidence pertaining to petitioner's behavior cast doubt upon petitioner's ability to comprehend the proceedings against him. Surely the Court of Appeals erred in concluding that the cumulation of data was insufficient to entitle petitioner to a competency exam. 52 U.S.L.W., supra, at 3826.

The dissent would grant certiorari "[e]specially because the correct answer to that question [*i.e.*, what is the standard for determining when a trial judge has a constitutional obligation to order a psychiatric examination to determine defendant's competency to stand trial] determines whether petitioner lives or dies[.]" Id. at 3825 (emphasis added). See, in this regard, State v. Noel, 102 N.J.L. 659, 680, 133 A. 274, 283 (E. & A. 1926) ("The law has always been zealous in the protection of one who has lost his reason To execute one bereft of reason would afford no example to others. It would be cruel and inhuman.")

(Footnote continued on next page)

to the pre-trial insanity investigation request on the part of the defendant. The constitutional infirmities found by the Brinks court as inherent in the factual setting before it, likewise should be found by this Court to inhere in the situation under review here. Cf. Ake v. Oklahoma, 663 P. 2d 1, 8 (Okla. Ct. Crim. App. 1983). See also, State v. Hamilton, 441 So. 2d 1192 (La. Sup. Ct. 1983), holding that defendant's "constitutional right to present a

(Footnote 15 continued)

See also, Eddings v. Oklahoma, --U.S. --, 102 S. Ct. 869 (1982), reversing a death sentence because of limitations placed by the trial court upon mitigating evidence, at the sentencing phase, which was directed at demonstrating defendant's background and family history. The Court held this action violated the rule in Lockett v. Ohio, 438 U.S. 586 (1978), that, in capital cases, the sentencer not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record," 438 U.S., supra at 604 (emphasis in original), quoted in Eddings, 102 S. Ct., supra at 874.

defense [citing Washington v. Texas, 388 U.S. 14 (1967)]," id. at 1194, was violated by the trial judge's exclusion of "the unquestionably relevant testimony," id., of a psychiatrist offered by the defense, in a case where "[d]efendant's only viable defense was insanity," id.

Decisions by various federal courts concerning applications for appointment of independent experts under provisions of the Criminal Justice Act of 1964, 18 U.S.C. §3006A(e)¹⁶ are instructive here; in construing the scope and intent of that statute, these courts have articulated principles and considerations which support petitioner's contentions

¹⁶ 18 U.S.C. §3006A(e) currently provides, in pertinent part:
Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate
(Footnote continued on next page)

here regarding access to independent psychiatric expertise in aid of his proffered insanity defense. See, for example, United States v. Schultz, 431 F. 2d 907 (8 Cir. 1970) (the purpose of the statute is "to provide the accused with a fair opportunity to prepare and present his case," id. at 911,¹⁷ and noting further that "the adversary system

(Footnote 16 continued)

inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services. P.L. 91-447, §1, Oct. 14, 1970.

¹⁷

In the course of its analysis of this issue, the court alluded to a portion of the legislative history of the statute as follows:

President John F. Kennedy, in transmitting proposals for this type of legislation to Congress wrote House Speaker John McCormack of the great need for such enactment:
(Footnote continued on next page)

cannot work successfully unless each party may fairly utilize the tool of expert medical knowledge to assist in the presentation of this issue [mental competency] to the jury." Id.)¹⁸

(Footnote 17 continued)

In the typical criminal case the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow. 2 U.S. Cong. & Admin. News p. 2993 (1964). Id. at 909, n. 2

¹⁸ A further observation made by the Schultz court is particularly pertinent to the facts of the instant case, to wit:

Schultz, in fact, never had the benefit of any psychiatric examination or evaluation directly related to his defense of insanity. True, the Federal Medical
(Footnote continued on next page)

Both the result and the rationale of the Schultz decision were subsequently endorsed by other courts. See, e.g., United States v. Theriault, 440 F. 2d 713 (5 Cir. 1971), cert den. 411 U.S. 984 (1973) (trial judge could not properly deny appointment of an expert under

(Footnote 18 continued)

Center physicians examined him to determine his competency to stand trial, but a substantial difference may exist between the mental state which permits an accused to be tried and that which permits him to be held responsible for a crime. United States v. Driscoll, 399 F. 2d 135 (2d Cir. 1968). Examination for the purpose of competency to stand trial may require less exactness than those examinations designed to determine sanity for the purpose of criminal responsibility. Id. at 912 (citations omitted).

18 U.S.C. §3006A(e) on the basis that an earlier appointment had been made under 18 U.S.C. §4244 ¹⁹ on the issue of defendant's competency to stand trial). In his opinion concurring in the result, Judge Wisdom stated:

I would read the statute . . . as requiring authorization for defense services when the attorney makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses. The trial judge should tend to rely on the judgment of the attorney who has the primary duty of providing an adequate defense. 440 F. 2d supra at 717.

¹⁹

18 U.S.C. §4244 authorizes a court, under certain circumstances, to compel a defendant to submit to psychiatric examination for the purpose of determining competency to stand trial; the results of such examination are reported to the court.

See also, United States v. Chavis, 476 F. 2d 1137 (D.C. Cir. 1973) (18 U.S.C. §3006A(e) "comprehends within its definition of 'expert witness' the assistance of a psychiatric expert in preparing and presenting an insanity defense," id. at 1141, and such expert "is intended to serve the interests of the defendant," id. at 1142); ²⁰ and United States v. Bass, 477 F. 2d 723, 725

²⁰

Cf. United States v. Caldwell, 543 F. 2d 1333 (D.C. Cir. 1975), cert. den 423 U.S. 1087 (1976), finding no error in a trial judge's denial of defendant's pre-trial motion for examination by a particular psychiatrist, which examination would have been in addition to those given earlier by court-appointed experts to assess defendant's competency to stand trial. At the time of the motion, the only issue before the trial court was defendant's competency, leading the appellate court to conclude: "When the trial court is satisfied that it can resolve the issue of competence without additional appointments, we cannot construe the failure to do so as a denial of expert assistance for a substantive defense of insanity." Id. at 1350. However, the court underscored "the distinction between appointment of (Footnote continued on next page)

(9 Cir. 1975) (an independent expert should be appointed, pursuant to the statute, "when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having independent financial means to pay for them.")

(Footnote 20 continued)

psychiatrists to aid the presentation of an insanity defense and such an appointment to assist the court in determining competence to stand trial." Id.

For an application of United States v. Schultz in another context, see United States v. Durant, 545 F. 2d 823 (2 Cir. 1976), finding reversible error in the trial judge's refusal -- in a case where fingerprint evidence was "pivotal" -- to appoint an independent expert in that field on behalf of an indigent defendant. The Court stated:

[T]he purpose of the [Criminal Justice] Act, confirmed by its legislative history, is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant

[T]he Act must not be emasculated by niggardly or inappropriate construction. Id. at 827

As noted above, although decided in the context of claims under 18 U.S.C. §3006A(e), cases such as these articulate fundamental equitable principles which should serve to guide this Court in its disposition of defendant's constitutional claims in the instant case. The "opportunity to present a meaningful defense based on lack of criminal responsibility," Schultz, 431 F. 2d, supra at 912, was clearly lacking here. The request for an independent expert was, under the circumstances, eminently reasonable and appropriate. See, Therisult, 440 F. 2d supra at 717 (Wisdom, J., concurring), and Bass, 477 F. 2d, supra at 725. In short, the equitable considerations which have led courts to a liberal construction of 18 U.S.C. §3006A(e) -- particularly in insanity defense cases -- should lead to a similarly favorable construction of

the constitutional claims of a criminal defendant, under sentence of death, who had no such statutory protection available to him under the law of the State in which he was tried.²¹

Furthermore, the distinction between examinations by court-appointed experts to determine competency to stand trial, and examinations by independent experts appointed by the court at the government's expense to aid in a defendant's presentation of the insanity defense, as clearly outlined in cases such as Schultz and Caldwell, both supra, is pertinent here. Further articulation of the distinction

²¹ See also, Matlock v. Rose, -- F. 2d -- (6 Cir., April 9, 1984), which notes that "[t]he case law is still developing on the scope of the constitutional duty to supply experts," slip op. at 13, but states unequivocally: "The need for psychiatric experts in a case in which insanity is the only defense is obvious [citing United States v. Taylor, 437 F. 2d 371 (4 Cir. 1971)]," id. at 13, n. 3

can be found in United States v. Alvarez, 519 F. 2d 1036 (3 Cir. 1975), in which the court took great pains to delineate the difference between the two types of examination with particular regard to the self-incrimination implications for defendants subject to such procedures.²²

²² Cf., Estelle v. Smith, 451 U.S. supra, finding violations of both Fifth and Sixth Amendment privileges in the State's use -- at the penalty phase of a capital trial -- of the contents of defendant's disclosures made in the course of a court-ordered psychiatric examination to determine competency to stand trial; defendant had introduced no psychiatric evidence on his own behalf at trial. The Fifth Amendment violation inhered in the State's effort to meet its burden of proof of defendant's future dangerousness by using defendant's statements "unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty." Id. at 466. The Sixth Amendment violation was found to exist in the denial to defendant of counsel's assistance in "making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id. at 471. In reaching these conclusions, the Court noted, without elaboration, that "a different situation arises where (Footnote continued on next page)

The court found no violation of the privilege against self-incrimination in the government's use at trial of the report and testimony of the psychiatrist appointed pursuant to defendant's application under 18 U.S.C. §3006A(e), since -- unlike examinations ordered under 18 U.S.C. §4244 -- defendant's disclosures to the §3006A(e) expert were "entirely voluntary." Id. at 1045. However, the court did find an inherent Sixth Amendment violation in such a situation, insofar as an expert retained to assist a defendant may be forced to be an involuntary government witness. The court concluded: "The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective

(Footnote 22 continued)
a defendant intends to introduce psychiatric evidence at the penalty phase." Id. at 472, 465-66, n. 10.

assistance of counsel in such cases." Id. at 1046. This conclusion was premised, in turn, upon the court's earlier pronouncement that "[t]he effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting." Id. (emphasis added). Accord, Noggle v. Marshall, 706 F. 2d 1408, 1413 (6 Cir. 1983), cert. den. -- U.S. --, 104 S. Ct. 530 (1983).²³

Finally, it is submitted that the very nature of psychiatric expertise itself necessitates subjecting such evidence to rigorous "adversarial testing" before the factfinder. Strickland v. Washington,

²³ See also, State v. Kociolek, 23 N.J. 400, 129 A. 2d 417 (1957); State v. Hamilton, 441 So. 2d, supra.

52 U.S.L.W., supra at 4570. See, in this regard, Barefoot v. Estelle, -- U.S. --, 103 S. Ct. 3383 (1983), in which this Court endorsed the validity of psychiatric expert testimony on questions of future dangerousness of defendants in capital cases, specifically relying on "the rules of evidence" and "the adversary system," 103 S. Ct. supra at 3397, to enable the factfinder to accord such evidence its appropriate weight. ²⁴

Rigorous "adversarial testing," in turn, requires that the adversaries themselves be equipped to handle effectively both the direct presentation

²⁴ See, Addington v. Texas, 441 U.S. 418, 430 (1979), in which the Court alludes to the "subtleties and nuances of psychiatric diagnosis" which "render certainties virtually meaningless" in the context of civil commitment hearings at which the issue is "whether the individual is mentally ill and dangerous . . . and . . . in need of confined therapy.[.]"

of psychiatric evidence as well as cross-examination of any experts offered in opposition. Thus, "the guiding hand of counsel," Powell v. Alabama, 287 U.S. supra at 69, itself requires guidance from the very experts whose testimony is elicited -- or challenged -- by counsel. In other words,

the blame for a suspect expert opinion must be borne together by the mental health professional who presents it and the legal professionals who wittingly allow its uncontested presentation. Poythress, "Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony," 2 L. & Hum. Behav. 1, 18 (1978). ²⁵

It has been suggested, furthermore, that as a general rule: many lawyers possess scant knowledge about psychiatric decision-making, diagnoses, and evaluation tools. This shortcoming can seriously impede their cross-examination of expert witnesses. Once psychiatric testimony is elicited few lawyers have the special skills to evaluate such testimony. (Footnote continued on next page)

A defense attorney, in a criminal trial involving the insanity defense, who is realistically expected to fulfill his proper role of adducing probative evidence in support of his client's claim and in challenging the State's evidence, must acquire the requisite psychiatric expertise to accomplish that task. At least one commentator has highlighted this imperative in insanity trials:

Insofar as the psychiatrist's decision to take one side or the other on the responsibility issue is based on pragmatic considerations or expediencies and not on the objective facts about the illness, this raises serious questions about expert testimony on the issue of sanity/

(Footnote 25 continued)

Perlin and Sadoff, "Ethical Issues in the Representation of Individuals in the Commitment Process," 45 L. & Contemp. Prob. 161, 166 (1983).

See also, Golten, "Role of Defense (Footnote continued on next page)

insanity. For though it is his special skill and training which entitles him to testify as an expert witness, the psychiatrist's expert opinion on the issue of insanity may be a function of his personal values and his own pragmatic judgments, not a function of the defendant's mental illness in any objective sense. Poythress, "Mental Health Expert Testimony: Current Problems," 5 J. Psychiatry & L. 201, 204 (1977)

Thus, defense counsel in insanity trials must be prepared both to thrust and to parry with psychiatric expert testimony. "Cross-examination may suggest the fallibility of the opposing psychiatrist and the shortcomings of the psychiatric profession. But calling to the stand a psychiatrist who disagrees with the opposing psychiatrist is an even better way of forcing judges and juries to use their common sense." Ennis and Litwack,

(Footnote 25 continued)

Counsel in the Criminal Commitment Process," 10 Am. Crim. L. Rev. 385 (1972).

"Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693, 746 (1974).²⁶

Advocacy, alone, does not suffice. Effective advocacy requires obtaining

26

Without some knowledge of how to effectively cross-examine psychiatric expert testimony or some appreciation of the testimony of an independent mental health examiner [an] attorney . . . could offer only a token defense for his client. Poythress, 5 J. Psychiatry & L., supra at 214.

See, generally, Ziskin, Coping With Psychiatric and Psychological Testimony (3d ed. 1981), for an in-depth survey and analysis of deficiencies -- and resultant lack of reliability -- inherent in a vast array of psychological and psychiatric methodologies. In the author's own words:

It is the aim of this book to demonstrate that despite the ever-increasing utilization of psychiatric and psychological evidence in the legal process such evidence frequently does not meet reasonable criteria of admissibility and should not be admitted in a court of law,
(Footnote continued on next page)

meaningful assistance in asserting a vigorous defense. Without access to independent psychiatric expertise in aid of such a defense in insanity trials, the constitutionally mandated level of adequate representation by counsel cannot be met.

(Footnote 26 continued)

and if admitted, should be given little or no weight. Id. at vii, quoting "[t]he first sentence of the first issue of this book published in 1970," id.

II.

THE INVOLUNTARY MEDICATION OF
PETITIONER WITH THORAZINE,
AFFECTING HIS DEMEANOR AND ABILITY
TO COMMUNICATE DURING TRIAL, VIOLATED
DUE PROCESS AND EQUAL PROTECTION RIGHTS

A. The Known Properties Of
Thorazine And Its Probable
Effects On Petitioner

It is a matter of record in this case that petitioner was regularly medicated against his will with 600 mg. of Thorazine daily during his trial. See, Transcript of Trial, June 23-26, 1980, at 469, 560-561, 574-75, 585 and 591. The question before the Court is the extent to which defendant was affected by this forced "drugging," and the degree to which his reaction to the Thorazine affected both the course and the outcome of his trial.

The position of amicus curiae is that a hearing was required on petitioner's mental status during the trial because

of the well-known properties of Thorazine,²⁷ its predictable side effects²⁸ and its as yet unknown, but very likely, causal relationship to what the Oklahoma Court of Criminal Appeals referred to as the "'abnormal' behavior" of petitioner throughout his capital trial.²⁹

²⁷ See, e.g., Kinross-Wright, "The Current Status of Phenothiazines," 200 J.A.M.A. 461 (1967); see also Physicians' Desk Reference 1896 (1984 ed.)

²⁸ See, e.g., Ayd, "A Survey of Drug Induced Extrapyrarnidal Reactions," 175 J.A.M.A. 1054 (1961); see also Hollister, "Adverse Reactions to Phenothiazines," 189 J.A.M.A. 311 (1964).

²⁹ In its opinion, the Oklahoma court acknowledged the drugging and described Ake's behavior at trial in these specific terms:

The appellant remained mute throughout his trial. He refused to converse with his attorneys and stared straight ahead during both stages of the proceedings.

Ake v. Oklahoma, 663 P. 2d supra, at 6

The Court speculated that "(i)t is quite possible that the defense of insanity (Footnote continued on next page)

Far from being a new development in psychopharmacology, Thorazine -- chemically named chlorpromazine -- was the first of the major psychotropic drugs to be developed and has been widely used to treat mental illness since its development in the early 1950's.³⁰

In a very short time, Thorazine became widely used and its properties quickly came to the attention of many courts, both state³¹ and federal,³² including,

(Footnote 29 continued)

interposed by appellant fostered such behavior on his part." Id., at 7, n. 4.

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Winick, "Psychotropic Drugs and Competence to Stand Trial," 1979 Am. Bar Fndtn Res. Journal 769, 780.

31 See, e.g., People v. Ackles, 304 P. 2d 1032 (C.A. 3rd Dis. Calif. 1956).

32 See, e.g., G.D. Searle & Co. v. Institutional Drug Distributors, 141 F. Supp. 838 (D.C. Cal. 1955).

eventually, this Court.³³ It is undisputed that, inter alia, Thorazine is a powerful sedative.³⁴ The caselaw description of this drug's properties have covered a range from "mild tranquilizer"³⁴ to a "powerful,"³⁶ "potentially dangerous,"³⁷ and, most

33 Vitek v. Jones, 445 U.S. 480 (1980), Transcript of Oral Argument, April 24, 1978, p. 29; Mills v. Rogers, 457 U.S. 291, 293, n. 1 (1982); Jones v. U.S., -- U.S. --, 103 S. Ct. 3043, 3058, n. 16 and 3060-61

34 Phenothiazines can also be classified in terms of the drowsiness that they produce in the first week or two of administration. Given in therapeutic doses, drugs such as chlorpromazine and thioridazine tend to produce the most drowsiness (and are for this reason sometimes called sedative phenothiazines). Detre and Jarecki, Modern Psychiatric Treatment 536 (Lippincott, 1971) (emphasis in original)

35 Ellis v. U.S., 484 F. Supp. 4, 6 (D.S.C. 1975)

36 Chesney v. Adams, 377 F. Supp. 887, 839 (D. Conn. 1974)

37 Ruiz v. Estelle, 503 F. Supp. 1265, 1326 (S.D. Tex. 1980), 650 F. 2d 555 (5 Cir. 1982), 666 F. 2d 854 (5 Cir. 1982), 679 F. 2d 1115 (5 Cir. 1982), (Footnote continued on next page)

recently "unavoidably unsafe",³⁸
"major tranquilizer."³⁹

An additional factor which this Court must consider -- and which should have been considered by the courts below-- is that, in addition to its well known, predictable and intended effects (and its equally well known if still unintended side effects), Thorazine can

(Footnote 37 continued)

688 F. 2d 266 (5 Cir. 1982), cert den. -- U.S. --, 103 S.C. 1438 (1983).

38

Stone v. Smith, Kline & French, No. 82-7232, slip op. (11th Cir., May 14, 1984). In that recent case, the manufacturer of Thorazine successfully defended a tort claim arising out of a patient's exposure to the drug by arguing that Thorazine was an "unavoidably unsafe" product within the terms of Comment k to Section 402A of the Restatement (Second) of Torts.

39

U.S. v. Wilson, 471 F. 2d 1072, 1074 (D.C. Cir. 1972), cert. den. 410 U.S. 957 (1973).

39

See, n. 28 supra.

also cause still other effects which vary widely by dosage and from individual to individual, its so-called "idiosyncratic" responses.⁴⁰ It is also now well-documented that the effects of Thorazine, like those of other psychotropic drugs, can even be further affected by the milieu or context in which it is given, including whether or not the drugs are taken voluntarily or -- as in this case -- involuntarily.⁴¹ Thus, virtually every case

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See, e.g., Deniker, "Impact of Neuroleptic Chemotherapies on Schizophrenic Psychoses," 135 Am. J. Psych. 923 (1978); see also Kolb and Brodie, Modern Clinical Psychiatry 395 (10th ed. 1982).

41

See, e.g., Rennie v. Klein, 462 F. Supp. 1131, 1141 (D.N.J. 1979) ("E. The Efficacy of Forced Medication"); see also, Cameron and Wimer, "An Anti-cholinergic Toxicity Reaction to Chlorpromazine Activated by Psychological Stress," 167 J. of Nerv. and Ment. Dis. 508 (1979); Hartley, Couper-Smartt and Henry, "Behavioral Antagonism Between Chlorpromazine and Noise in Man," 55 Psychopharmacology 97 (1977). See also, as to the very high degrees of stress (Footnote continued on next page).

involving the "right to refuse" medication has specifically included Thorazine in the list of drugs subject to its procedures.⁴²

As noted above, it is in the very nature of Thorazine to produce drowsiness,

(Footnote 41 continued)

associated with being charged with, convicted of and/or sentenced for a crime, Goldberg and Breznitz, eds.; Handbook of Stress: Theoretical and Clinical Aspects at 340-45 (Free Press, 1983).

⁴² See, e.g., Rennie v. Klein, 476 F. Supp. 1294, 1306 (D.N.J. 1979); Anderson v. State of Arizona, 663 P. 2d 570, 572 (Ariz. Ct. App. 1983); Davis v. Hubbard, 506 F. Supp. 915, 927 (N.D. Ohio 1980); Jamison v. Farabee, No. C-78-0445-WHO N.D. Calif., (Consent Order filed April 26, 1983), reported at 7 Ment. Dis. L. Repr. 436 (1983); Project Release v. Prevost, 722 F. 2d 960, 977 n. 17 (2nd Cir. 1983); Rogers v. Okin, 478 F. Supp. 1342, 1360 (D. Mass. 1979); and Rogers v. Comm. of Mental Health, 390 Mass. 489, 458 N.E. 2d 308, 310 n. 3 (S.J.Ct. 1983).

In addition, the Oklahoma "right to refuse" case, In re K.K.B., 609 P. 2d 747 (Okla. Sp. Ct. 1980), clearly includes Thorazine within its term "major tranquilizers" although no specific drugs are named. 609 P. at 748.

apathy and even resistance to speaking. Despite the state court's dismissal of petitioner's "abnormal" behavior as possibly "fostered by his insanity defense,"⁴³ his demeanor and attitude could actually have just as likely been either the result of the forced administration of Thorazine or the product of

⁴³ Allegations of "faking" have been a standard institutional response to patients' complaints about the severe side effects of psychotropic medications. See, e.g., Rennie v. Klein, 462 F. Supp. supra at 1140. This is hardly a new problem. In 1838, Dr. Issac Ray, the father of American forensic psychiatry, noted that:

[T]he supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease, and is always put forward in objection to the more human doctrines.

Ray, A Treatise on the Medical Jurisprudence of Insanity, supra, §247, at 243.

his mental illness.⁴⁴ Only a hearing on petitioner's mental status while under medication at the trial could even begin to answer the question of what factors were actually responsible for his admittedly "abnormal" behavior at trial.

44

Schizophrenic patients with post-psychotic depression have been described as "wooden" in appearance, motorially "inactive or retarded," lacking initiative to perform routine tasks, experiencing overwhelming fatigue and neurasthenic symptoms, "hypersomnic" and "emotionally withdrawn." Nearly all reports comment on the patient's disinclination to speak. All of these symptoms, however, can be manifestations of antipsychotic drug-induced akinesia.

Van Putten and May, "'Akinetic Depression' in Schizophrenia," 35 Arch. Gen. Psych. 1101 (1978). See also, Hartley and Couper-Smartt, "Paradoxical Effects in Sleep and Performance of Two Doses of Chlorpromazine," 58(2) Psychopharmacology 201 (1978); Scott v. Plante, 532 F. 2d 939, 945, n. 8 (3 Cir. 1976), 641 F. 2d 117 (3 Cir. 1981), vac. and rem. 458 U.S. 1101, 102 S. Ct. 3474 (1982), on remand 691 F. 2d 634 (3 Cir. 1982).

B. The Relevant Caselaw And Other Authorities Support Petitioner's Arguments Against His Drugging

In a number of well-reasoned cases and articles, courts and other authorities have considered the impropriety of administering medication to defendants in a manner which primarily affects their demeanor and ability to communicate at trial.⁴⁵

45 Initially, courts have considered the drugging of defendants, particularly with narcotics, in the context of effects on intellectual and cognitive functioning rather than the issues of demeanor and communication involved here. See, e.g., Sanders v. U.S., 373 U.S. 1 (1963); Hansford v. U.S., 365 F. 2d 920, 922-23 (D.C. Cir. 1966). Thus, for example, in Whitehead v. Wainwright, 447 F. Supp. 898 (M.D. Fla. 1978), aff'd on this issue, vac. and rem. on other grounds, 609 F. 2d 223 (5 Cir. 1980), the issue was the effects of tranquilizers and other drugs on the defendant's cognitive ability.

Two of the leading cases --

State v. Murphy, 56 Wash. 2d 761, 355 P. 2d 323 (1960) and State v. Maryott, 6 Wash. App. 96, 492 P. 2d 239 (1971) have already been extensively discussed by the parties and the court below.⁴⁶ The most recent important case considering the issue of the effects of drugging on demeanor is Commonwealth v. Louraine, 390 Mass. 28, 453 N.E. 2d 437 (S. J. Ct. 1983) decided in August, 1983 by the Supreme Judicial Court of Massachusetts, the same court which in November, 1983 decided Rogers v. Commissioner of Mental Health, 390 Mass. 489, 458 N.E. 2d 308 (S.J. Ct. 1983), on the certification of questions from the

⁴⁶ See also, In re Pray, 133 Vt. 253, 336 A. 2d 174 (1975) (jury should have been informed that defendant was heavily medicated, thereby affecting his behavior at trial).

First Circuit after the remand from this Court in Mills v. Rogers, supra. In Louraine, the Court summarized its views on the state of the law on the issue now before this Court, see 453 N.E. 2d supra at 442-3, and concluded, relying on Murphy, Maryott and In re Pray, all supra, that defendant had the right to be tried in an unmedicated condition; on this basis the conviction below was reversed.

Thus, it is clear from the earlier decisions in Murphy, Maryott, Pray and now Louraine, that such courts are considering and criticizing the administration of psychotropic medication which affects demeanor and communication as a concern distinct from the issues of drugging of defendants vel non and competency at trial.⁴⁷

⁴⁷ Compare Scrignar, "Tranquilizers and the Psychotic Defendant," 53 A.B.A.J. 43 (1967); Bushman and Reed, "Tranquilizers (Footnote continued on next page)

Similarly, other well-respected commentators on the general subject of drugging defendants have repeatedly addressed the demeanor issue in terms consistent with the holdings in Murphy, Maryott and Louraine and with petitioner's position here.⁴⁸ In particular, the typical side-effects of Thorazine and other psychotropic drugs have been specifically noted as factors requiring regular psychiatric and judicial monitoring of a medicated defendant's mental

(Footnote 47 continued)

and Competency to Stand Trial," 54 A.B.A.J. 284 (1968).

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See, e.g., Winick, supra at 782: "The fact that the defendant's competence is drug induced should not disqualify him from trial unless the drug causes side effects that materially impair his ability to understand and participate in the proceedings." (emphasis added). See also, Group for the Advancement of Psychiatry: Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial, 903-4 (February, 1974).

status during trial.⁴⁹ It is worth noting that even earlier comments on the use of these drugs in trial specifically highlighted the problems that the drugs could cause by substantially altering the demeanor of the defendant.⁵⁰

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Specific psychiatric-legal inquiries on the patient-defendant's mental competency to stand trial should be conducted regularly during the entire period of the patient's drug treatment

Haddox and Pollack, "Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)," 17 J. For. Sci. 568, 575 (1972). See also, Haddox Gross and Pollack, "Mental Competency to Stand Trial While Under the Influence of Drugs," 7 Loyola L.A.L.R. 424, 446-7 (1974).

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Use of drugs, could, of course, interfere with a defendant's competency to stand trial, if, for example, the drug's effect were to give him an odd appearance that might lead a jury to misinterpret his courtroom demeanor: an unperturbed "wooden face" might give a jury the impression that the defendant is (Footnote continued on next page)

To some extent this newly emerging issue of altered demeanor and restricted communication ability at trial under forced medication ⁵¹ can be analogized to the historical practices of binding, ⁵² gagging or shackling defendants or even to the display before the court of defendants in prison clothes. ⁵³ To be sure, there are obvious similarities, in terms of jury prejudice and inter-

(Footnote continued)

a calculating merciless
criminal

Burt and Morris, "A Proposal For Abolition of the Incompetency Plea," 40 U. Chi. L. Rev. 66, 85-6 (1972).

⁵¹ The issue of drug-altered demeanor had also surfaced earlier in the context of state commitment hearings. See, e.g., Suzuki v. Quisenberry, 411 F. Supp. 1114 (D. Haw. 1976). See also, "Developments in the Law: Civil Commitment of the Mentally Ill," 87 Harv. L.R. 1190, 1282-3, n. 11 (1974).

⁵² See, e.g., Illinois v. Allen, 397 U.S. 337 (1970). The analogy between drugs and chains is not original to any one source. See, e.g., State v. Maryott, supra at 241; see also Ferleger, "Loosing the Chains: In-Hospital Civil Liberties of Mental Patients," 13 Santa Clara Law. 447 (1973).

⁵³ See, e.g., Estelle v. Williams, 425 U.S. 501 (1976).

ference with right to counsel, between the "zombie" or "mask face" drugged defendant and the bound, gagged and shackled accused. Yet, even the most extensive physical restraints can be removed in a few moments to permit free movement and communication, whereas drugging with Thorazine has long-lasting effects on both demeanor and attitude. ⁵⁴ A fortiori then, apart from a jury's continued memory of any physical restraints once they are removed, the die is cast once a defendant has been drugged for any appreciable period before or during trial as petitioner was in this case.

In the shackling situation, this

⁵⁴ See, e.g., Winsberg and Yepes, "Antipsychotics (Major Tranquilizers, Neuroleptics)" in Werry ed. Pediatric Psychopharmacology: The Use of Behavior Modifying Drugs in Children, at 237-38 (1978). See also, as to shackles and other physical restraints compared to psychotropic medication, Rennie v. Klein, 720 F. 2d supra at 274 (concurring opinion of Weis, J.)

Court has required the application of a careful set of increasingly restrictive measures before permitting the final step of binding, gagging and shackling.⁵⁵ Here, there was no determination at trial of what caused petitioner's behavior or whether, in effect, he was actually being chemically bound, gagged and shackled or being forceably maintained in a demeanor over which he could exercise no control.⁵⁶ Again, as with the

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56 See Illinois v. Allen, supra.

In Ake v. Oklahoma, 663 P. 2d supra at 7, the Court sought to distinguish Peters v. State, 516 P. 2d 1373 (Okla. Cr. 1973) on the basis that Ake's medicated condition was not for the sole purpose of facilitating his trial. Given that the result was the same in the eyes of the jury, whatever the alleged purpose of the medication, this seems to be a distinction without a difference.

issue of the effects of Thorazine generally, it is submitted that an appropriate solution would be to require a hearing on the demeanor-altering and communication-restricting effects of defendant's drugging at time of trial.⁵⁷

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The need for such an inquiry in turn underscores the imperative of affording defendants in this situation access to independent psychiatric expertise in furtherance of a proffered insanity defense. See, pp. 40-46.

CONCLUSION

Based on the foregoing, amicus respectfully submits that the conviction and sentence of death should be reversed and the matter remanded for re-trial in a manner consistent with the principles articulated herein.

Respectfully submitted,

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MOTION FILED
JUN 1 - 1984

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No. 83-5424

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

GLEN BURTON AKE,
Petitioner,
v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE FOR THE
AMERICAN PSYCHIATRIC ASSOCIATION

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
FOR THE AMERICAN PSYCHIATRIC ASSOCIATION**

The American Psychiatric Association (APA) hereby moves, pursuant to Rules 36 and 42 of this Court's rules, to file the attached brief amicus curiae in *Glen Burton Ake v. Oklahoma* in support of petitioner. Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has advised that he will take no position on the filing of this, or any other, amicus brief.

The APA, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 30,000 of the approximately 35,000 psychiatrists in the United States are APA members. The APA has participated as amicus curiae in numerous cases involving mental health issues, including *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982), *Mills v. Rogers*, 102 S. Ct. 2442 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979); *Addington v. Texas*, 441

U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The APA believes that it can make an important contribution to this Court's consideration of the issues presented in this case. In recent years, the APA has been actively involved in examining the role of psychiatrists in criminal cases. Of particular concern to the APA and its members is the reliance on psychiatric testimony to determine a defendant's mental state at the time of the crime, and also to determine whether, in capital cases, a defendant poses a risk of "future dangerousness." In addition, the APA is concerned about the appropriate utilization of psychotropic medications in various settings, including the treatment of individuals who have been found incompetent to stand trial.

The attached brief focuses on three areas. The first concerns the importance of a psychiatric examination to assist a defendant in the preparation and presentation of an insanity defense. The second concerns the need for expert testimony to rebut the prosecution's use of psychiatric evidence to establish a defendant's "future dangerousness" at the sentencing phase of a capital trial. And the third discusses the use of antipsychotic medication to render an indicted defendant competent to stand trial.

For the reasons stated above, the APA respectfully requests that the motion to file the attached brief amicus curiae be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT	1
Pretrial Proceedings	2
Trial Proceedings	4
Appeal Proceedings	5
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL ENTAILS THE RIGHT TO GOVERNMENT ASSISTANCE IN OBTAINING AN EXPERT EVALUATION OF A DEFENDANT'S MENTAL STATE AT THE TIME OF THE OFFENSE	9
Nature of the Right.....	9
Dimensions of the Right	14
II. AN INDIGENT DEFENDANT IN A CAPITAL CASE IS ENTITLED TO A PSYCHIATRIC EXPERT, AT STATE EXPENSE, TO REBUT THE PROSECUTION'S USE OF PSYCHIATRIC TESTIMONY TO PROVE "FUTURE DANGEROUSNESS"	19
III. THE TRIAL COURT WAS NOT SUFFICIENTLY ALERT TO THE POSSIBILITY THAT, ALTHOUGH PROPERLY TREATED WITH ANTIPSYCHOTIC MEDICATION, PETITIONER MAY HAVE BECOME INCOMPETENT DURING TRIAL	21
CONCLUSION	25

TABLE OF AUTHORITIES

CASES:	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979).....	11
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972)	10
<i>Barefoot v. Estelle</i> , 103 S.Ct. 3383 (1983)	<i>passim</i>
<i>Douglas v. California</i> , 372 U.S. 353 (1963).....	6, 9, 10
<i>Drope v. Missouri</i> , 420 U.S. 152 (1975)	23, 24
<i>Edney v. Smith</i> , 425 F. Supp. 1038 (E.D.N.Y. 1976), <i>aff'd without opinion</i> , 556 F.2d 556 (2d Cir. 1977)	18
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981)	10, 18
<i>Finney v. Zant</i> , 709 F.2d 643 (11th Cir. 1983)....	13
<i>Gaither v. State</i> , 13 Md. App. 245, 282 A.2d 535 (1971)	13
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	10
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	10
<i>Hammett v. State</i> , 578 S.W.2d 699 (Tex. Crim. App. 1979)	13
<i>Houston v. State</i> , 602 P.2d 784 (Alaska 1979)....	17
<i>Irvin v. State</i> , 617 P.2d 588 (Okl. Cr. 1980).....	6
<i>McGarty v. O'Brien</i> , 188 F.2d 151 (1st Cir.), <i>cert. denied</i> , 341 U.S. 928 (1951)	13
<i>Missouri v. Carter</i> , 641 S.W.2d 54 (Mo. 1982)....	17
<i>Noggle v. Marshall</i> , 706 F.2d 1408 (6th Cir. 1983)..	17, 18
<i>People v. Edney</i> , 39 N.Y.2d 620, 385 N.Y.S.2d 23, 350 N.E.2d 400 (1976)	17
<i>People v. Knippenberg</i> , 66 Ill. 2d 276, 362 N.E.2d 681 (1977)	17
<i>People v. Lines</i> , 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975)	17
<i>Pouncey v. State</i> , 353 So. 2d 640 (Fl. App. 1977)..	17
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932).....	9, 14
<i>Proffitt v. United States</i> , 582 F.2d 854 (4th Cir. 1978), <i>cert. denied</i> , 447 U.S. 910 (1980)	13
<i>Revard v. State</i> , 332 P.2d 967 (Okl. Cr. 1958)....	11
<i>Richardson v. State</i> , 569 P.2d 1018 (Okl. Cr. 1977)	11
<i>Rinaldi v. Yeager</i> , 384 U.S. 305 (1966)	9
<i>Rogers v. State</i> , 634 P.2d 743 (Okl. Cr. 1981)....	11
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974)	6, 9

TABLE OF AUTHORITIES—Continued

	Page
<i>Satterfield v. Zahradnick</i> , 572 F.2d 443 (4th Cir.), <i>cert. denied sub nom. Satterfield v. Mitchell</i> , 436 U.S. 920 (1978)	13
<i>State v. Hayes</i> , 118 N.H. 458, 389 A.2d 1379 (1978)	23
<i>State v. Jojola</i> , 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976)	23
<i>State v. Kociolek</i> , 2 N.J. 400, 120 A.2d 417 (1957)	17
<i>State v. Law</i> , 270 S.C. 664, 244 S.E. 2d 302 (1978)	23
<i>State v. Pratt</i> , 284 Md. 516, 398 A.2d 421 (1979)..	17
<i>State v. Toste</i> , 178 Conn. 626, 424 A.2d 293 (1979)	17
<i>Stidham v. State</i> , 525 P.2d 1227 (Okl. Cr. 1974)....	3
<i>Strickland v. Washington</i> , — U.S. —, 52 U.S.L.W. 4565 (May 14, 1984)	10, 12, 13
<i>United States v. Baldi</i> , 344 U.S. 561 (1953)	<i>passim</i>
<i>United States v. Alvarez</i> , 519 F.2d 1036 (3d Cir. 1975)	17
<i>United States v. Taylor</i> , 437 F.2d 371 (4th Cir. 1971)	13
<i>Wood v. Zahradnick</i> , 578 F.2d 980 (4th Cir. 1978)	13
STATUTES and RULES:	
18 U.S.C. 3006A (Supp. III 1979)	13
Okla. Stat. tit. 21, § 701	5
OTHER AUTHORITIES:	
American Bar Association, <i>Criminal Justice—Mental Health Standards, First Tentative Draft</i> (1983)	13, 15
American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (3d ed. 1980)	16

TABLE OF AUTHORITIES—Continued

	Page
P. Appelbaum & T. Gutheil, "Rotting With Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusals by Psychiatric Patients, 7 Bull. Amer. Acad. Psychiat. & Law 308 (1979)	23
W. Appelton & J. Davis, <i>Practical Clinical Psychopharmacology</i> (1980)	24
Ayd, A Survey of Drug-Induced Extrapyramidal Reactions, 175 J. Am. Med. Ed. Assoc. 1054 (1961)	24
R. Baldessarini, <i>Chemotherapy in Psychiatry</i> (1977)	22
J. Bernstein, <i>Rational Use of Antipsychotic Drugs</i> , in J. Bernstein, <i>Clinical Psychopharmacology</i> (2d ed. 1984)	25
Goldberg, Carmen & Cole, <i>Changes in Schizophrenic Psychopathology and Ward Behavior as a Function of Phenothiazine Treatment</i> , 111 Brit. J. Psychiatry 120 (1965)	22
T. Gutheil & P. Appelbaum, <i>Mind Control, Synthetic Sanity, Artificial Competence, and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication</i> , 12 Hofstra L. Rev. 77 (1983)	22
L. Hollister, <i>Antipsychotic Medications and the Treatment of Schizophrenia</i> , in Barchas, Berger, Ciaranello & Elliott, <i>Psychopharmacology: From Theory to Practice</i> 138 (1977)	25
National Institute of Mental Health Psychopharmacology Service Center Collaborative Study Group, <i>Phenothiazine Treatment in Acute Schizophrenia: Effectiveness</i> , 10 Archives Gen. Psychiatry 246 (1964)	22
D. Klein, R. Gittelman, F. Quitkin & A. Rifkin, <i>Diagnosis and Drug Treatment of Psychiatric Disorders: Adults and Children</i> , (2d ed. 1980)	23

TABLE OF AUTHORITIES—Continued

	Page
D. Klein & J. Davis, <i>Diagnosis and Drug Treatment of Psychiatric Disorders</i> (1969)	23
Note, <i>The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings</i> , 55 Cornell L. Rev. 632 (1970)	13
Rifkin, Quitkin & Klein, <i>Akinesia: A Poorly Recognized Drug-induced Extrapyramidal Behavioral Disorder</i> , 32 Archives Gen. Psychiatry 672 (1975)	24
Van Putten & May, "Akinetic Depression" in <i>Schizophrenia</i> , 35 Archives Gen. Psychiatry 1101 (1978)	24

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-5424

GLEN BURTON AKE,
v. *Petitioner,*
STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

**BRIEF AMICUS CURIAE FOR THE
AMERICAN PSYCHIATRIC ASSOCIATION**

INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears from the foregoing motion.

STATEMENT

Petitioner Glen Burton Ake stands convicted by an Oklahoma trial court of two counts of first degree murder and two counts of shooting with intent to kill. He has been sentenced to death by lethal injection for the murder counts and to prison terms of five hundred years each for the shooting counts. The facts pertaining to these crimes, essentially undisputed at trial, are set forth in the opinion of the Oklahoma Court of Criminal Appeals. 663 P.2d 1, 4.

Pretrial Proceedings

Ake was arraigned before the district court of Canadian County on February 14, 1980, approximately four months after the killings. The district court initially found Ake incompetent to stand trial, based on psychiatric evaluations conducted at the court's direction. These evaluations were strictly limited to the question of Ake's "present sanity," i.e., his competence to stand trial. (P 16-17).¹ No inquiry was made, and no medical opinions were formulated, as to Ake's mental condition at the time of the crimes.²

Ake was diagnosed as suffering from schizophrenia of the paranoid type. At a competency hearing on April 10, Dr. William Allen testified that Ake's schizophrenia was "chronic" and that "in addition to the psychiatric diagnosis, he is dangerous." (P 22). Dr. Allen recommended that, in view of "the severity of his mental illness," the "intensities of his rage," his "poor control" and his "delusions," Ake be placed in a maximum security psychiatric facility. *Ibid.*

Following the incompetency determination, Ake was committed to the state mental hospital in Vinita, Okla-

¹ Because the parties' joint appendix was not available at the time this brief was printed, all references to the record herein are to the separate appendices submitted with the Petition and with respondent's Opposition. References to petitioner's appendix are indicated by the letter "P" followed by the page number of that appendix. References to respondent's appendix are prefaced with the letter "R".

² A psychiatric evaluation concerning present competency is very different from an evaluation concerning a defendant's mental state at the time of the charged offenses. The former involves a contemporary inquiry focusing on a defendant's basic capacity to understand the criminal proceedings and to assist counsel. The latter involves a more subtle and complicated retrospective determination of a defendant's mental condition and the relationship between that condition and the criminal behavior at issue.

homa for treatment. Ake remained at this facility for more than two months, during which time he was administered Thorazine, a widely-used antipsychotic medication.³ Although Ake was carefully evaluated during his commitment and apparently given a broad range of physiological and psychological tests, the doctors assigned to his care again made no inquiry concerning his mental condition at the time of the crimes.

On May 22, Dr. R. D. Garcia, chief of forensic psychiatry at the state hospital, reported to the trial court that Ake had improved to the point "where he would be able to adequately consult with an attorney and he does have a rational as well as actual understanding of the proceedings pending against him." Dr. Garcia also advised the court that Ake was being treated with Thorazine and recommended that the medication be continued. (P 20).⁴ On the basis of this medical opinion, the court scheduled the case for trial.⁵

Pretrial motions were heard on June 13, at which time Ake's appointed counsel requested financial assistance to obtain a psychiatric evaluation of Ake's mental condition at the time of the crimes. (P 23-30). Although the stated legal basis for this motion was somewhat vague, counsel made clear his view that the provision of

³ Thorazine, a trade name for chlorpromazine, is one of the antipsychotic medications commonly used for treatment of schizophrenia. See pp. 22-23, *infra*.

⁴ Dr. Garcia reported that Ake was receiving 600 milligrams of Thorazine daily, administered in three equal doses of 200 milligrams. This dosage remained unchanged through Ake's trial.

⁵ After receipt of Dr. Garcia's letter to the court, defense counsel withdrew their motion for a second competency hearing. (R 3). At the time of trial, however, they advised the court that they had been unable to communicate with Ake, and that they had grave doubts as to his capacity to understand the nature of the pending proceedings. (R 469, 503, 608).

such assistance was constitutionally-compelled.⁶ The court was plainly sympathetic to the request, but ruled that it was without discretion under state law to authorize the use of public funds for defense expenses. (P 31).⁷ The court also ruled that Ake had no constitutional right to the requested assistance, citing *United States v. Baldi*, 344 U.S. 561 (1953).

Trial Proceedings

Petitioner's brief trial began on June 24, 1980 and ended the next day. At the guilt phase of the proceedings, the only significant issue—and the *only* asserted defense—was Ake's claim that he was legally insane at the time of the charged offenses. Not surprisingly, Ake had virtually no relevant evidence to offer on this point.

The defense called three witnesses: Dr. Allen, Dr. Garcia, and Dr. Jack P. Enos, a third physician who had evaluated Ake in connection with his involuntary commitment. The witnesses testified that Ake suffered from schizophrenia of the paranoid type, and that during psychotic episodes he experienced powerful delusions in which he saw himself as a "sword of vengeance." (R 558). On cross-examination, however, each witness explained that he had not evaluated Ake with respect to his mental state at the time of the crimes, and therefore could express no valid medical opinion on that question. This crucial deficiency in the witnesses' testimony was repeatedly stressed by the prosecutor, both during his questioning of the witnesses and in his summation to the jury. (P 34, 36, 45, 49, 51).

⁶ Counsel stated as follows: "Glenn Ake, indigent [with] court-appointed counsel, still under the constitution is entitled to monies for a psychiatrist as if he . . . had the money to pay for it." (P. 26).

⁷ The court characterized state law in this regard as "almost crippling restrictive" (P 31), citing *Stidham v. State*, 525 P.2d 1227 (Okl. Cr. 1974).

The sentencing phase of the trial was even more truncated, consisting only of argument by counsel concerning mitigating and aggravating circumstances. The prosecution urged the jury to find, as one of the statutorily-prescribed circumstances in aggravation, that Ake "would commit criminal acts of violence that would constitute a continuing threat to society." 21 O.S. § 701.12(7). In support of this claim, the prosecution relied expressly on the testimony to this effect given by Dr. Garcia during the guilt phase of the trial. (P 64). Dr. Garcia had testified as a defense witness, but his prediction of future dangerousness was elicited by the prosecutor on cross-examination. (P 50).⁸

At the conclusion of the trial the jury found three aggravating circumstances, including the circumstance relating to future dangerousness. On this basis petitioner was sentenced to death.

Appeal Proceedings

On appeal, the Oklahoma Court of Criminal Appeals affirmed Ake's convictions in all respects. The court gave short shrift to the argument that Ake was entitled to a psychiatric evaluation of his mental condition at the time of the crimes. The court viewed the issue as con-

⁸ Although not addressed in the petition to this Court, we note that Dr. Garcia's testimony in this regard, and the state's express adoption of that testimony at the sentencing phase of the trial, may fall within the prohibition of *Estelle v. Smith*, 451 U.S. 454 (1981). The Court there held that, consistent with a defendant's fifth and sixth amendment rights, a prosecution psychiatrist who conducts an examination on the question of competency may not subsequently testify on the issue of future dangerousness, absent appropriate warnings to the defendant and protection of his right to counsel. As far as amicus is aware, the record in this case is silent on the questions (1) whether petitioner's counsel was present during Dr. Garcia's psychiatric examinations, or (2) whether petitioner was given any warnings concerning the scope and purpose of the examinations.

trolled by its own decision in *Irvin v. State*, 617 P.2d 588 (Okla. Cr. 1980). That case, in turn, relied on this Court's decision in *United States v. Baldi*, *supra*.

The Court of Criminal Appeals also rejected Ake's claim that the forced administration of Thorazine so impaired his competency that he was effectively denied his right to be present at trial and to consult with counsel. Although acknowledging Ake's "abnormal" behavior at trial, 663 P.2d at 7 n.4, the court speculated that Ake was feigning in order to bolster his defense of insanity. *Ibid*. The court also concluded that Ake's competency was sufficiently clear to relieve the trial judge of any obligation to look into the matter *sua sponte*.

Finally, the appeals court turned aside the suggestion that Ake should have been given the opportunity to refuse treatment with antipsychotic medication. The court stressed that the Thorazine was administered not for purposes of sedating Ake during trial, but to restore his competency so that he could stand trial. The court concluded that an indicted defendant has no right to refuse medication given for that purpose.

SUMMARY OF ARGUMENT

This case raises important questions concerning the extent to which a defendant's indigency can be permitted to handicap his exercise of the right to a fair trial. Although the Constitution does not require "absolute equality" among criminal defendants, *Douglas v. California*, 372 U.S. 353, 357 (1963), this Court has made clear that indigent defendants, no less than affluent defendants, must be provided an "adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

I. Consistent with these principles, we think it is clear that, once a defendant's sanity has been placed in issue, the state is required to provide him with a psy-

chiatric examination to assist in the preparation and presentation of his insanity defense. Absent such an examination, it is virtually inconceivable that the insanity claim will be given a fair hearing.

The assistance of a psychiatrist is crucial in both creating and interpreting highly relevant medical evidence bearing on the defendant's state of mind at the time of the crime. Only as a result of a psychiatric examination does this evidence come into existence. Moreover, psychiatric testimony is almost always necessary to make the insanity defense comprehensible to the fact-finder. Such testimony is needed to relate episodes of mental illness, whether occurring before or after the crime, to the relevant time period of the charged offenses. Such testimony is also needed to give the jury a logical and coherent account of how a particular mental illness can affect the criminal conduct with which the defendant is charged.

In providing indigent defendants with a psychiatric examination, states should have the same flexibility that they have in providing indigent defendants with the assistance of counsel. Thus, the psychiatric expert could either be appointed by the trial court or selected by the defense. The key consideration, we submit, is that the examination given an indigent defendant be no less confidential than a psychiatric examination obtained by a non-indigent defendant at his own expense. Because of the importance of confidentiality to the conduct of the examination, the availability of this protection should not depend on a defendant's economic circumstances.

II. A capital defendant must also be afforded the assistance of a psychiatric expert to rebut the prosecution's use of medical testimony to establish the defendant's "future dangerousness" at the sentencing phase of the trial. In *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), the Court held that considerations of due process do not

bar psychiatric predictions of a defendant's "future dangerousness," notwithstanding the extreme unreliability of such testimony. The decision assumed, however, that defendants would be able to rebut the scientific basis for such predictions through the testimony of their own medical experts. Fundamental fairness therefore requires that, if a capital defendant is indigent, the state provide him with financial assistance to obtain his own psychiatrist for this purpose.

III. If a defendant is incompetent to stand trial because of schizophrenia or some other psychotic disorder, the state may properly treat him with antipsychotic medications, whether forcibly or otherwise. Available evidence demonstrates overwhelmingly that antipsychotic drugs are effective in eliminating or reducing the symptoms of psychotic illness. Moreover, antipsychotic medications are competency-inducing drugs rather than competency-impairing drugs. To the extent antipsychotics alter mental functioning, they do so by returning the patient to his normal, pre-psychotic state.

Despite their general efficacy, however, antipsychotic medications can cause side effects, some of which may interfere with a defendant's competency to stand trial. A trial court therefore must remain alert to the possibility that, as a result of treatment with antipsychotics, a defendant may be made competent at the beginning of trial and yet become incompetent during the course of his trial. When the court is presented with indications of such incompetency, it should immediately make an appropriate inquiry into the matter.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL ENTAILS THE RIGHT TO GOVERNMENT ASSISTANCE IN OBTAINING AN EXPERT EVALUATION OF A DEFENDANT'S MENTAL STATE AT THE TIME OF THE OFFENSE

The undisputed facts of this case show that petitioner was given no real opportunity to assert what might have been a successful defense of insanity. Although diagnosed as suffering from a severe mental disorder, Ake was never given access to a psychiatrist to evaluate his mental state at the time of the crimes. Amicus submits that, under these circumstances, there can be little doubt that Ake was denied his right to a fair trial.

Nature of the Right

Petitioner's underlying problem, of course, is his indigency: Oklahoma did not prohibit Ake from consulting with a psychiatrist or other expert; it simply refused to appoint one or to provide Ake with financial assistance so that he could retain his own psychiatrist. Nonetheless, this Court has long recognized that a criminal defendant's economic circumstances cannot be permitted to stand in the way of his right to a fair trial.

Although the Constitution does not require "absolute equality" among criminal defendants, *Douglas v. California*, 372 U.S. 353, 357 (1963), it does require that the judicial system be "free of unreasoned distinctions," *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966), and that "indigents have an adequate opportunity to present their claims fairly within the adversary system," *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). The state cannot adopt procedures that extend to indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful" opportunity to defend themselves. *Douglas v. California*, *supra*, 372 U.S. at 358.

Thus, indigent defendants must be appointed counsel in any case, state or federal, in which they might be subject to imprisonment. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). An indigent defendant is also entitled to a trial transcript prepared at state expense, *Griffin v. Illinois*, 351 U.S. 12 (1956), and to appointed counsel in any appeals as of right, *Douglas v. California*, *supra*. These and related guarantees have been variously founded on the Equal Protection Clause, the Sixth Amendment, and the Due Process Clause. Whatever the textual reference, however, the overarching consideration has always been the defendant's fundamental right to a fair trial. See *Strickland v. Washington*, — U.S. —, 52 U.S.L.W. 4565, 4570 (May 14, 1984).

In *Gideon v. Wainwright*, *supra*, this Court characterized as an "obvious truth" the proposition that a defendant "cannot be assured a fair trial unless counsel is provided for him." 372 U.S. at 344. We believe it is equally obvious that, no matter how valid, a defense of insanity cannot be given a fair hearing unless a defendant has had a valid psychiatric examination on the question of his mental state at the time of the charged offenses. Although amicus has previously argued that psychiatric testimony is given too much weight on the question of a capital defendant's "future dangerousness," see *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), *Estelle v. Smith*, *supra*, psychiatric testimony on the question of a defendant's mental state is indispensable.

In virtually every jurisdiction in the country, proof of mental illness is a threshold requirement in establishing the defense of insanity. Because a finding of mental illness "turns on the meaning of facts which must be in-

terpreted by expert psychiatrists and psychologists," *Addington v. Texas*, 441 U.S. 418, 429 (1979), a defendant must be given the assistance of qualified experts in both preparing and presenting his defense. Denied this assistance, an indigent defendant has, at best, only a theoretical opportunity to seek acquittal on grounds of insanity.⁹

A psychiatric expert performs functions that are crucial to the fact-finding process. In the first place, he makes available to the jury relevant evidence that otherwise would not be considered. This includes the results of physiological and psychological tests, information derived from questioning and observing a defendant over an extended period of time, as well as "medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Addington v. Texas*, *supra*, 441 U.S. at 430. This highly relevant evidence only comes into existence as a result of a valid psychiatric evaluation.

At the same time, the psychiatric expert performs an interpretive function that is essential to the jury's deliberations. Although largely meaningless to a lay person, the data generated in a psychiatric evaluation enables the psychiatrist to formulate an opinion on the question of a defendant's mental state at the time of the crime. The psychiatrist thus transforms clinical data into evidence that is accessible to the fact-finder. Similarly, the psychiatrist's interpretive skills are brought to bear on any "direct" evidence that may be available in a particular

⁹ In Oklahoma, as in all other jurisdictions, the defendant is initially presumed to be sane. Once the defendant has established a reasonable doubt as to his sanity, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the crime. See *Rogers v. State*, 634 P.2d 743, 744 (Okla. Cr. 1981); *Richardson v. State*, 569 P.2d 1018, 1020 (Okla. Cr. 1977).

case, such as contemporaneous writings of the defendant or lay witnesses' observations of unusual behavior. Even nonclinical data of this type must be subject to the careful interpretation of a diagnostician.

Assuming a defendant has a valid insanity defense, it is hard to imagine how, absent the assistance of a psychiatrist both before and during trial, he will be able to persuade the jury of its merits. Because of the essentially retrospective nature of the sanity inquiry, it does the defendant little good to show only that he was seriously mentally ill at some point *other than* the time of the crime. Indeed, Ake's predicament illustrates this point all too clearly. In his case, and in general, psychiatric testimony is necessary to relate episodes of mental illness, whether occurring before or after the crimes, to the relevant time period of the charged offenses.

Psychiatric testimony is also necessary to provide the jury with an explanation for conduct that might otherwise appear incomprehensible. Lay jurors may be able to recognize that a defendant's actions are aberrant or bizarre. Only on the basis of a clinical diagnosis, however, can they seriously entertain the possibility that the defendant is not responsible for these actions. Psychiatric testimony is necessary to explain the effects of a defendant's mental disorder on his cognition or control—relevant factors under the insanity tests of most jurisdictions. Psychiatric testimony is also necessary to give the jury a logical and coherent account of how a particular mental illness can affect the criminal behavior with which the defendant is charged. This account is a crucial link in the defense.

That the fair trial right may entail access to a psychiatrist was strongly suggested only this Term in *Strickland v. Washington*, *supra*. The Court there considered whether a capital defendant was denied "actual effective assistance of counsel" where, *inter alia*, his

court-appointed attorney failed to obtain a psychiatric evaluation in connection with the sentencing phase of the trial. Although the Court rejected the claim on the facts of that case, *Strickland* makes clear that a constitutional violation would be established if the decision to forgo a psychiatric examination is both negligent and prejudicial. *Accord Wood v. Zahradnick*, 578 F.2d 980 (4th Cir. 1978). The infringement of a defendant's right to a fair trial would appear to be exactly the same whether the absence of the examination is attributable to attorney neglect or, as here, a restrictive state policy.

Because of the importance of psychiatric testimony on the question of a defendant's sanity, the right to at least one impartial examination is almost universally recognized. See, e.g., *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983); *Satterfield v. Zahradnick*, 572 F.2d 443 (4th Cir.), *cert. denied sub nom. Satterfield v. Mitchell*, 436 U.S. 920 (1978); *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951); *Gaither v. State*, 13 Md. App. 245, 282 A.2d 535 (1971); *Hammett v. State*, 578 S.W.2d 699 (Tex. Crim. App. 1979). The right to "services necessary for an adequate defense," including the services of a psychiatrist, is accorded federal defendants under the Criminal Justice Act of 1964, 18 U.S.C. 3006A(e)(1). See *Proffitt v. United States*, 582 F.2d 854, 857-58 (4th Cir. 1978), *cert. denied*, 422 U.S. 910 (1980); *United States v. Taylor*, 437 F.2d 371, 377 (4th Cir. 1971). Similar assistance for obtaining investigative and expert services is provided by statute in virtually every state other than Oklahoma. Pet. at 13-14. See Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 635-37 (1970).¹⁰

¹⁰ The right to government assistance in securing a pretrial psychiatric evaluation is given explicit endorsement in the current draft of the American Bar Association's Criminal Justice Mental Health Standards. Section 7-3.3 of the draft standards states: "The right to defend oneself against criminal charges includes an

"A rule adopted with such unanimous accord reflects, if it does not establish, . . . the fundamental nature of that right." *Powell v. Alabama*, *supra*, 287 U.S. at 73.

In rejecting Ake's request for a psychiatric examination, the Oklahoma courts relied on this Court's decision in *United States v. Baldi*, *supra*. *Baldi*, however, cannot be read so broadly. Although the Court there found no constitutional infirmity in the denial of a defense motion for a pretrial psychiatric consultation, the Court stressed that the defendant had already been examined by three psychiatrists, at least one of whom had evaluated the defendant on the question of his sanity at the time of the crime. 344 U.S. at 568. The defendant in *Baldi*, in other words, had been given precisely the examination that Ake was denied.

In sum, there can be little question that an indigent defendant is entitled to a psychiatric examination, at state expense, on the question of his mental state at the time of the charged offenses. Without it, a defendant is not given a meaningful opportunity to assert the insanity defense; nor is the jury given a meaningful opportunity to consider it.

Dimensions of the Right

For purposes of deciding this case, the Court need only hold that, consistent with *Baldi*, Ake was entitled to some psychiatric examination on the question of his mental state at the time of the crimes. It should be noted, however, that the procedures used to implement this right pose several subsidiary issues that the Court should ad-

adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to a defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation."

dress to provide guidance to the Oklahoma courts upon remand. We now turn briefly to a discussion of two such issues.

First, under what circumstances should the right be triggered? It would seem fair to require a defendant to show that his request for a psychiatric examination is not frivolous. The state should not be put to the expense of paying for a defense psychiatrist unless a defendant's sanity is genuinely in issue. On the other hand, the showing required of a defendant cannot be so extensive as to vitiate the right itself. A defendant may have a potentially valid insanity defense and yet, at the time of the request, exhibit few symptoms of mental illness that would be recognizable to counsel or the court.

We think a reasonable position is that taken in the American Bar Association's proposed standards relating to mental health issues in criminal cases. Under the ABA proposal, defense counsel is required to explain to the Court, in an *ex parte* proceeding, the basis for his belief that a psychiatric evaluation "could support a substantial legal defense." American Bar Association, *Criminal Justice—Mental Health Standards, First Tentative Draft* § 7-3.3 (1983). Once this presentation is made, the court must "grant the defense motion as a matter of course" unless it determines that the motion "has no foundation." *Ibid*.

However the standard is articulated, there can be little doubt that Ake's sanity was genuinely in issue at the time of his request for a psychiatric examination. Ake was diagnosed as a paranoid schizophrenic, a diagnosis supported by his response to antipsychotic medication. Although it is certainly possible that Ake was not actively experiencing the symptoms of this disorder at the time of the offense, it is also possible that he was. The record indicates that Ake was first diagnosed as schizophrenic in late February 1980, slightly more than four

months after the killings. We note that generally accepted diagnostic criteria for schizophrenia require a clinical finding of continuing signs of the illness for a period of six months. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed.) at page 189. Moreover, one of the state's psychiatrists described Ake's schizophrenia as "chronic" (P 22), a diagnosis that ordinarily is not made unless the illness has been evident for more than two years. *Id.* at 192.¹¹

The second issue relates to the nature of the psychiatric examination that the state must provide. At one extreme, it would seem clear that the state must furnish sufficient assistance to assure that the defendant receives a *valid* examination. For example, if psychological and physiological tests are necessary, the state must be prepared to pay for them. At the other extreme, it would seem clear that the state's financial commitment in this regard cannot be open-ended. Thus, a defendant would have no right to undergo one examination after another, at state expense, until he found that *particular* psychiatrist who told him exactly what he wanted to hear. Fundamental fairness requires only that a defendant be given one thorough psychiatric examination on the question of his mental state at the time of the crimes.

As a general matter, the state should have the same latitude in determining how to provide an indigent defendant with a psychiatric examination as it does in determining how to provide an indigent defendant with the assistance of counsel. This means the state could set

¹¹ Although there were references to the APA's *Diagnostic and Statistical Manual* at trial, the witnesses did not make clear what criteria they were applying in formulating their diagnosis. However, amicus is aware of no generally accepted diagnostic criteria under which a diagnosis of chronic schizophrenia could be made without a finding of continuous evidence of the illness for a period substantially longer than six months.

up an appointment procedure, under which a defense psychiatrist would be selected by the trial court. Alternatively, the state could provide for reimbursement of defense counsel for the cost of an examination with a psychiatrist of the defendant's choice. While obviously desirable from the defense standpoint, the latter procedure may also be preferable to the prosecution because it would avoid possible litigation over the fairness and objectivity of the examining psychiatrist.

The crucial consideration, we submit, is that the psychiatric examination given an indigent defendant must be treated as confidential to the same extent as an examination obtained by a non-indigent defendant at his own expense. Examinations of the latter type are generally regarded as subject to the attorney-client privilege. See *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975).¹² As such, all communications among the defendant, his counsel and the consulting psychiatrist, together with the psychiatrist's findings and opinion, are shielded from disclosure until the privilege is validly waived. See, e.g., *Houston v. State*, 602 P.2d 784 (Alaska 1979); *State v. Toste*, 178 Conn. 626, 424 A.2d 293 (1979). Although there is some disagreement on the point, the clear majority of decisions construing the privilege in this context have held that it is not waived until the defendant's psychiatrist is called as a witness at trial.¹³

¹² Because psychiatric examinations in this context are not undertaken primarily for purposes of treatment, the physician-patient or psychotherapist-patient privilege is generally inapplicable. See *United States v. Alvarez*, *supra*, 519 F.2d at 1046; *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983).

¹³ See *United States v. Alvarez*, *supra*; *Houston v. State*, *supra*; *State v. Toste*, *supra*; *People v. Knippenberg*, 66 Ill. 2d 276, 362 N.E. 2d 681 (1977); *People v. Lines*, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975); *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979); *State v. Kociolek*, 2 N.J. 400, 120 A.2d 417 (1957); *Pouncey v. State*, 353 So. 2d 640 (Fl. App. 1977). But see *Missouri v. Carter*, 641 S.W.2d 54 (Mo. 1982); *People v. Edney*, 39 N.Y.2d

We believe that confidentiality is important for the conduct of a valid psychiatric examination on the issue of a defendant's criminal responsibility. A psychiatrist performing such an examination will ordinarily question the defendant closely concerning the crimes with which he is charged. Whether intentionally or not, the psychiatrist's questioning may also elicit information pertaining to defenses other than insanity, or to crimes that have not yet been detected or with which the defendant has not been linked. It stands to reason that a defendant will not speak freely about such matters unless he knows, in advance, that his statements will go no further than the examining psychiatrist. Just as a patient will not discuss intimate matters with a therapist unless the doctor-patient privilege applies, so a criminal defendant will not divulge all necessary information concerning his mental state unless he is given adequate assurances of confidentiality.¹⁴

We are not suggesting that a rule of confidentiality is constitutionally mandated.¹⁵ What we do suggest, however, is that a defendant may not be denied the benefit

620, 385 N.Y.S.2d 23, 350 N.E.2d 400 (1976) (by raising the defense of insanity, a defendant waives the privilege with respect to any psychiatric examination, whether or not the psychiatrist is called as a defense witness).

¹⁴ In *Estelle v. Smith*, *supra*, this Court suggested in *dicta* that, once a defendant gives notice that he intends to introduce psychiatric testimony to support his defense of insanity, he may be forced to submit to an examination on that issue with a prosecution psychiatrist. 451 U.S. at 465-66. Although fairness to the government may require that the prosecution have "equal access" to the defendant, it does not require that the prosecution have access to the information disclosed to the defendant's psychiatrist, or to the psychiatrist's findings and opinions.

¹⁵ We note that two federal courts have rejected the claim that the fifth and sixth amendments compel a rule of strict confidentiality. See *Noggle v. Marshall*, *supra*; *Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir. 1977).

of a confidential examination simply because he is unable to afford his own psychiatrist. Because confidentiality is so important to the conduct of the examination, fundamental fairness requires that, if the state extends confidentiality to the examinations of non-indigent defendants, it do the same for indigent defendants.

II. AN INDIGENT DEFENDANT IN A CAPITAL CASE IS ENTITLED TO A PSYCHIATRIC EXPERT, AT STATE EXPENSE, TO REBUT THE PROSECUTION'S USE OF PSYCHIATRIC TESTIMONY TO PROVE "FUTURE DANGEROUSNESS"

Quite apart from the right of a psychiatric examination on the question of sanity, an indigent defendant in a capital case must be accorded the assistance of a psychiatrist or other expert to rebut the prosecution's claim of "future dangerousness" at the sentencing phase of the trial. This separate right, we submit, should apply whether or not the defendant has interposed a defense of insanity.

In *Barefoot v. Estelle*, 103 S.Ct. 3383 (1983), the Court held that considerations of due process do not prohibit psychiatric testimony on the question of a defendant's future dangerousness. Although acknowledging the extreme unreliability of such testimony, 103 S.Ct. at 3397 & n.7, the Court reasoned that the adversary process could be trusted to expose its deficiencies. "We are not persuaded," the Court stated, "that the fact finder . . . will not be competent to uncover, recognize, and take due account of [the] shortcomings" of psychiatric predictions of future dangerousness. *Id.* at 3397.

In reaching this conclusion, however, the Court assumed that the defense would be able to rebut such predictions through the use of its own expert testimony. The Court stressed that, in addition to challenging the prosecution's evidence on cross-examination, a capital defend-

ant would have an "opportunity to present his own side of the case," *id.* at 3398, through the presentation of "contrary evidence." *Id.* at 3397. Indeed, the Court specifically noted that the defendant in *Barefoot*, unlike petitioner here, was entitled by statute to state assistance in retaining a psychiatric expert for this purpose. *Id.* at 3397 n.5.

The decision in *Barefoot*, then, presupposes that if the prosecution is to use psychiatric testimony to establish the aggravating circumstance of future dangerousness, the defense must be given the opportunity to challenge the scientific basis for such predictions through the testimony of its own psychiatric expert.¹⁶ Cross-examination alone will often be insufficient to impeach the prosecution's psychiatrist, particularly where he purports to justify his prediction on the basis of a clinical diagnosis. In view of the grave consequences that such testimony can have, a defendant's poverty should not be permitted to stand in the way of a full exploration of these issues. Fundamental fairness therefore requires that, if a capital defendant is indigent, the state provide him with financial assistance to retain his own expert witness.

The issue of the right to psychiatric assistance at the sentencing stage is fairly raised on the facts of this case. Dr. Garcia, the state psychiatrist who treated Ake at the

¹⁶ The role of the psychiatrist appointed or retained for this purpose is to be distinguished from that of the psychiatrist who assists a defendant in the presentation of an insanity plea. In this context, there may be no need for a psychiatric examination; on the basis of published studies alone, the defendant's psychiatrist can testify concerning the unreliability of long-term psychiatric predictions of dangerousness. Consistent with this Court's decision in *Barefoot v. Estelle*, *supra*, however, there may be occasions where a defendant is entitled to an examination—for example, where he seeks to contest the prosecution psychiatrist's underlying diagnosis, or where the defense psychiatrist believes that he could render a valid prediction that the defendant will *not* commit further acts of violence.

state mental hospital, testified at trial that, because of his mental illness, Ake posed a threat of continuing criminal violence. (P 50). This testimony was crucial to the state's case because the prosecutor had previously argued that, if acquitted by reason of insanity, Ake would be "out on the street a free man" (P 9), thus suggesting he was not sufficiently dangerous to warrant continued commitment.

Although Dr. Garcia and the other psychiatrists were called as witnesses by the defense, this was obviously done only out of desperation. Ake was permitted no expert of his own, and these were the only doctors who had examined him for any purpose at all. Moreover, the record indicates that defense counsel did not question Dr. Garcia on the issue of future dangerousness; the witness' testimony in this regard was elicited on cross-examination and expressly adopted by the prosecutor in his summation to the jury. (P 50, 64). Finally, it is fair to assume that the only reason the prosecution did *not* call Dr. Garcia as its witness at the sentencing phase is that he had already stated his prediction of dangerousness at the guilt phase.

In sum, Ake's sentence should be vacated for the separate reason that he was not given the assistance of a psychiatric expert to rebut the prosecution's use of psychiatric evidence to show future dangerousness.

III. THE TRIAL COURT WAS NOT SUFFICIENTLY ALERT TO THE POSSIBILITY THAT, ALTHOUGH PROPERLY TREATED WITH ANTIPSYCHOTIC MEDICATION, PETITIONER MAY HAVE BECOME INCOMPETENT DURING TRIAL

The record in this case indicates that, after determining that Ake had been restored to competency in late May, the trial court made no further inquiry, before or during trial, as to whether he remained legally competent. At trial defense counsel several times alerted the

court to the possibility that Ake's Thorazine medication was interfering with his ability to assist counsel and understand the proceedings. Counsel stated that he had been unable to communicate with his client at any point during the trial. (R. 469). He also described Ake as a "zombie" who had been rendered "totally and completely incoherent." (R. 469, 503).

At the outset, we note that there was nothing objectionable about the decision to treat Ake with antipsychotic medication, whether forcibly or otherwise. Widely used in this country since the mid-1950s,¹⁷ antipsychotics have been shown repeatedly to be an effective form of treatment for serious psychotic disorders, including schizophrenia. See T. Gutheil & P. Appelbaum, *Mind Control, Synthetic Sanity, Artificial Competence, and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hofstra L. Rev. 77, 100 (1983). These medications have been demonstrated to reduce or eliminate auditory and other types of hallucinations, disordered thought processes, delusions, agitation, withdrawal and other symptoms. See, e.g., The National Institute of Mental Health Psychopharmacology Service Center Collaborative Study Group, *Phenothiazine Treatment in Acute Schizophrenia: Effectiveness*, 10 Archives Gen. Psychiatry 246 (1964); Goldberg, Carmen & Cole, *Changes in Schizophrenic Psychopathology and Ward Behavior as a Function of Phenothiazine Treatment*, 111 Brit. J. Psychiatry 120 (1965). Although the drugs are not a panacea for all patients, their general utility

¹⁷ Thorazine (chlorpromazine) was one of the first antipsychotic drugs introduced in the United States. It is a member of the phenothiazine class of chemical compounds, from which most other antipsychotic medications have been derived. See generally R. Baldessarini, *Chemotherapy in Psychiatry*, 12-56 (1977). In recent years other classes of chemical compounds have been found to have similar clinical properties. *Ibid.*

in the treatment of psychotic disorders is, at this point, no longer a matter of dispute.¹⁸

Moreover, antipsychotic medications, unlike some other types of psychotropic drugs, do not depend for their efficacy on the sedation of the patient. They are competency-inducing drugs rather than competency-impairing drugs. By suppressing psychotic symptoms, they restore normal mentation, allowing the "cognitive part of the brain to come back into play." *State v. Jojola*, 89 N.M. 489, 492, 553 P.2d 1296, 1299 (Ct. App. 1976). Accord *State v. Hayes*, 118 N.H. 458, 389 A.2d 1379 (1978); *State v. Law*, 270 S.C. 664, 244 S.E. 2d 302 (1978). Thus, the "rebel," cured of his psychosis with medications, "remains the rebel . . . still." P. Appelbaum & T. Gutheil, "Rotting With Their Rights On": *Constitutional Theory and Clinical Reality in Drug Refusals by Psychiatric Patients*, 7 Bull. Amer. Acad. Psychiat. & Law 308, 310 (1979) (footnote omitted). Even when antipsychotics fail to eliminate all symptoms of the illness, their effect is to alter mental functioning in the direction of normalcy.

For these reasons there is no merit to the suggestion that Ake should have been permitted to refuse treatment with antipsychotic medication, and the decision of the Oklahoma Court of Criminal Appeals in this regard was clearly correct. At the same time, however, that Court was too quick to conclude that the trial judge had no reason to question Ake's continuing competency at trial. In *Drope v. Missouri*, 420 U.S. 152, 181 (1975), this Court made clear that:

¹⁸ The studies concerning the effectiveness of antipsychotics, too voluminous to cite here, are referenced in D. Klein, R. Gittelman, F. Quitkin & A. Rifkin, *Diagnosis and Drug Treatment of Psychiatric Disorders: Adults and Children*, 88-144 (2d ed. 1980) and D. Klein & J. Davis, *Diagnosis and Drug Treatment of Psychiatric Disorders*, Chapter 4 (1969).

"Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."

The fact is that, despite their general efficacy, anti-psychotic medications, like all drugs, can cause side effects in some patients. Thorazine, for example, can cause severe drowsiness, particularly during the first several weeks of use. See W. Appelton & J. Davis, *Practical Clinical Psychopharmacology* 61 (1980). Thorazine can also induce parkinsonism, a motor disorder that resembles naturally occurring Parkinson's disease. Typical symptoms include muscular rigidity, tremors, and a sharp decrease in spontaneous movement. See Ayd, *A Survey of Drug-Induced Extrapyramidal Reactions*, 175 J. Am. Med. Ed. Assoc. 1054, 1055-59 (1961). Although parkinsonism does not ordinarily affect the cognitive processes, the disorder occasionally evolves into "akinesia," a condition characterized by extreme apathy, difficulty in initiating routine activities, and suppression of spontaneous movement and speech.¹⁹

These side effects could very well interfere with a defendant's ability to "understand the proceedings" against him and to "consult with his lawyer with a reasonable degree of rational understanding . . ." *Drope v. Missouri*, *supra*, 420 U.S. at 170 n.7. We do not mean to suggest that Ake necessarily had either of these side effects. We do suggest, however, that there is a possibility that Ake became incompetent at trial, notwithstanding that he continued to receive his prescribed dose of Thorazine. In view of Ake's evidently abnormal behavior, as well as defense counsel's repeated warnings, the trial court should

¹⁹ See Van Putten & May, "Akinetic Depression" in *Schizophrenia*, 35 Archives Gen. Psychiat. 1101 (1978); Rifkin, Guitkin & Klein, *Akinesia: A Poorly Recognized Drug-induced Extrapyramidal Behavioral Disorder*, 32 Archives Gen. Psychiat. 672 (1975).

have held a hearing to consider evidence, including the results of an additional psychiatric examination, on the question of Ake's continuing competency.²⁰

CONCLUSION

For the foregoing reasons, the decision of the Oklahoma Court of Criminal Appeals should be reversed.

Respectfully submitted,

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²⁰ In the event that medication-induced side effects do cause a defendant to become incompetent, this condition is often readily remediable. Akinesia, for example, can be effectively treated with traditional anti-parkinsonian medications. Similarly, Thorazine-induced drowsiness can usually be corrected by reducing the dosage or by dividing the total dosage into smaller amounts administered more frequently. L. Hollister, *Antipsychotic Medications and the Treatment of Schizophrenia*, in Barchas, Berger, Ciaranello & Elliott, *Psychopharmacology: From Theory to Practice* 138 (1977). If this does not work, or if the change in dosage weakens the drug's therapeutic effect, the patient can be switched to other antipsychotic medications having similar clinical properties. See J. Bernstein, *Rational Use of Antipsychotic Drugs*, in J. Bernstein, *Clinical Psychopharmacology* 150-53 (2d ed. 1984).

JUN 1 - 1984 No. 83-5424

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Supreme Court of the United States
OCTOBER TERM, 1983**

GLEN BURTON AKE, PETITIONER

v.

**THE STATE OF OKLAHOMA,
Respondent.**

**ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE;
AND**

**BRIEF OF THE PUBLIC DEFENDER OF OKLAHOMA
COUNTY, OKLAHOMA, THE PUBLIC DEFENDER OF
TULSA COUNTY, OKLAHOMA, AND THE OKLAHOMA
CRIMINAL DEFENSE LAWYER'S ASSOCIATION, AS
AMICI CURIAE SUPPORTING PETITIONER.**

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No. 83-5424

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DEFENDER OF OKLAHOMA COUNTY,
OKLAHOMA, THE OFFICE OF THE PUBLIC
DEFENDER OF TULSA COUNTY,
OKLAHOMA, AND THE OKLAHOMA CRIMINAL
DEFENSE LAWYERS ASSOCIATION FOR
LEAVE TO FILE BRIEF AMICI CURIAE
IN SUPPORT OF PETITIONER.

To the Honorable, The Chief Justice and Associate Justices of the United States Supreme Court:

The Office of the Public Defender of Oklahoma County, Oklahoma, the Office of the Public Defender of Tulsa County, Oklahoma, and the Oklahoma Criminal Defense Lawyer's Association (OCDLA) respectfully moves for leave to file the attached brief amici curiae.

The consent of the attorney for the petitioner has been obtained and filed with the Clerk. Respondent has declined to consent, based on its Office policy of remaining silent with regard to amici curiae briefs.

The Office of the Public Defender of Oklahoma and of Tulsa Counties are statutorily created offices created for the primary purpose of representing indigent persons accused of crimes, including capital offenses. 19 Okl. Stat. §§138.1

et. seq. On several occasions, these Offices have attempted, without success, to obtain funds for investigating and presenting expert witnesses, and to secure mitigating evidence in capital cases. See, Davis v. State, 665 P.2d 1186 (Okl.Cr. 1983); Cox v. State, 644 P.2d 1077 (Okl.Cr. 1982); Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980). This Office is vitally interested in the resolution of this case affirming a constitutional right to these funds.

The OCDLA is a statewide, non-profit organization of over 200 criminal defense attorneys dedicated to goals of professional excellence, protection of the rights of individuals, and the promotion of justice through law. Various members of the Association are appointed by the courts to represent indigent defendants outside the Tulsa and Oklahoma Counties. Like

these public defenders, they receive no funding for expert witnesses, or mitigation evidence in capital cases. See Maghe v. State, 620 P.2d 433 (Okla. Cr. 1980). The membership of this Association shares the interest of the Public Defenders of Tulsa and Oklahoma Counties in affirming a constitutional right to these funds.

Amici Curiae concurs with all of the arguments advanced in the Petition for Writ of Certiorari, and Brief of Petitioner filed in this case. However, Amici notes that each of the attorneys for Amici are Oklahoma lawyers practicing criminal law on an exclusive basis. Because counsel for Mr. Ake is not an Oklahoma lawyer, and is not intimately familiar with Oklahoma procedure, petitioner has not addressed how the nuances of Oklahoma law and procedure effect this issue. Because the primary purpose of the attached brief amici curiae

is to demonstrate to the Court the relationship of current Oklahoma law and procedure to this issue, this brief can make a contribution to the Court's decisional process in this case.

Accordingly, the Offices of the Public Defender of Oklahoma and Tulsa Counties, Oklahoma and the OCDLA move for leave to file the attached brief amici curiae.

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QUESTIONS PRESENTED

Amici will address the following issues:

1. When an indigent defendant's legal sanity at the time of the offense is seriously in issue, can a state constitutionally refuse to provide any opportunity whatsoever for him to obtain expert psychiatric examination necessary to prepare and establish his insanity defense?

2. Is an indigent defendant facing the death penalty entitled to financial assistance to prepare and present evidence in his favor at the sentencing hearing?

TABLE OF CONTENTS

Questions Presented	i
Table of Authorities	ii
Interest of Amici	1
Summary of Agreement	2
 I. WHEN AN INDIGENT DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY AT ISSUE, THE STATE MAY NOT CONSTITUTIONALLY DENY HIM THE MEANS TO ESTABLISH THE DEFENSE . . .	 4
A. THE OKLAHOMA STATUTORY SCHEME PROVIDING DEFENSE COUNSEL FOR AN INDIGENT CRIMINAL DEFENDANT ALLOWS NO FUNDS FOR OBTAINING OR PRESENTING EXPERT WITNESSES IN SUPPORT OF THE INSANITY DEFENSE. . . .	 4
B. OKLAHOMA RULES OF LAW AND PROCEDURE REGARDING THE INSANITY DEFENSE MAKE IT NEARLY IMPOSSIBLE TO PREVAIL WITHOUT THE AID OF EXPERT TESTIMONY.	 10
C. THE CONSTITUTION REQUIRES THAT IF AN INDIGENT CRIMINAL DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY IN DOUBT, HE MUST BE PROVIDED WITH THE NECESSARY MEANS TO OBTAIN AND PRESENT EXPERT TESTIMONY TO SUPPORT THAT DEFENSE	 18
 II. AN INDIGENT DEFENDANT FACING THE DEATH PENALTY IS ENTITLED TO NECESSARY FINANCIAL ASSISTANCE TO PREPARE AND PRESENT RELEVANT MITIGATING EVIDENCE .	 22

Conclusion	29
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TABLE OF AUTHORITIES

<u>Adair v. State</u> , 6 Okl.Cr. 284, 118 P. 416 (1911)	11
<u>Ake v. State</u> , 663 P.2d 1, 6 (Okl.Cr. 1983)	20
<u>Bias v. State</u> , 568 P.2d 1269 (Okl. 1977) .	7
<u>Bills v. State</u> , 585 P.2d 1366 (Okl.Cr. 1978)	16
<u>Bounds v. Smith</u> , 430 U.S. 817 (1977) . .	27,28
<u>Cox v. State</u> , 644 P.2d 1077, 1079 (Okl.Cr. 1982)	23,25n10
<u>Davis v. State</u> , 665 P.2d 1186, 1190 (Okl.Cr. 1983)	8,9,21,26,29
<u>Earl v. Tulsa County District Courts</u> , 606 P.2d 545 (Okl.Cr. 1979)	9
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	23,26
<u>Estelle v. Smith</u> , 451 U.S. 454 (1981) . .	26
<u>Garrett v. State</u> , 586 P.2d 754 (Okl.Cr. 1978)	14
<u>Gresham v. State</u> , 489 P.2d 1335, 1357 (Okl.Cr. 1971)	12
<u>Hardt v. State</u> , Okl.Cr. 490 P.2d 752 (1971)	8
<u>High v. State</u> , 401 P.2d 189 (Okl.Cr. 1965)	12

<u>Irvin v. State</u> , 617 P.2d 588 (Okl.Cr. 1980)	8,9,20,26
<u>Johnson v. State</u> , Motion Hearing Transcript January 28, 1982	29
<u>Jones v. State</u> , 648 P.2d 1251, 1254 (Okl.Cr. 1982), cert. den. ___ U.S. ___, 103 S.Ct. 799	11
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)4,23,28,29	
<u>Maghe v. State</u> , 620 P.2d 433, 435 (Okl.Cr. 1980)	7
<u>Munn v. State</u> , 658 P.2d 482, 484 (Okl.Cr. 1983)	13
<u>McFarthing v. State</u> , 630 P.2d 324 (Okl.Cr. 1981)	16
<u>Public Defender of Oklahoma County, T. Hurley Jordan, and Assistant Public Defender of Oklahoma County, Robert A. Ravitz v. Court Fund of Oklahoma County, the Honorable Jack R. Parr, Dan Gray, Court Clerk, and the Honorable Charlie Y. Wier.</u> (Case no. 55715 denied September 20, 1980) . . .	5, n2
<u>Reed v. State</u> , 23 Okl.Cr. 56, 212 P. 441 (1923).	13
<u>Richardson v. State</u> , 569 P.2d 1018, 1020 (Okl.Cr. 1977).	12
<u>Smith v. State</u> , 594 P.2d 784 (Okl.Cr. 1979).	26,n11
<u>Sontag v. State</u> , 629 P.2d 1269 (Okl.Cr. 1981)	4

<u>State v. Palmer</u> , CRF-82-984, District Court of Oklahoma County.	17
<u>State v. Paris Johnson</u> , CRF-80-1081 and CRF-80-1082.	5
<u>Strickland v. Washington</u> , ___ U.S. ___, slip op. p. 26 (1984).	18, n7
<u>Tittle v. State</u> , 44 Okl.Cr. 287, 280 P. 865 (1929).	12
<u>United States ex rel Smith v. Baldi</u> , 344 U.S. 561 (1953).	20,21,27
<u>Wardeus v. Oregon</u> , 412 U.S. 470 (1973) . .	6
<u>Westbrook v. Zant</u> , 704 F.2d 1481, 1496 (11th Cir. 1983)	26
<u>Whisenhunt v. State</u> , 279 P.2d 366 (Okl.Cr. 1955)	13,14
<u>Wilson v. State</u> , 568 P.2d 1279 (Okl.Cr. 1977)	12,14

CONSTITUTION, STATUTES, ETC.

Title 22 Okl. Stat. §464, 1271	4,6
Title 19 Okl.Stat. §138.1.	4
Title 19 Okl. Stat. §137.1; 138.4.	5,7,9
Title 20 Okl. Stat. §1304(a)(b)(3)	5
18 U.S.C.A. §3006 A(E)	8
Title 19 Okl.Stat. §138.6.	9

<u>Maas v. Territory</u> , 10 Okl. 714, 717, 63 P. 960, 961 (1901)	10
<u>M'Naghten Rule</u> , 8 Eng. Rptr. 718 (HL 1843)	10
<u>Revised Laws 1910 §2094 now Title 21</u> Okl. Stat. §152(4)	11
<u>Note, The Indigent's Right to an Adequate Defense: Expert in Investigational Assistance In Criminal Proceedings</u> , 55 Cornell L. Rev. 632, 641-43 (1970) .	19
Title 22 Okl. Stat. §1175.1.	21
Title 22 Okl. Stat. §1125.3.	21,n8
Title 22 Okl. Stat. §1175.4, 1175.5. . .	21,n8
<u>Report of the Attorney General's Commission on Poverty in the Administration of Federal Criminal Justice</u> , at 11 (1963)	22
Title 21 Okl.Stat. §701.13(C)(3)	23
Title 22 Okl. Stat. §982.	26,n11
Eighth and Fourteenth Amendments	28

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BRIEF OF THE PUBLIC DEFENDER
OF OKLAHOMA COUNTY, OKLAHOMA,
AND THE PUBLIC DEFENDER
OF TULSA COUNTY, OKLAHOMA,
AND THE OKLAHOMA CRIMINAL DEFENSE
LAWYER'S ASSOCIATION,
AS AMICI CURIAE SUPPORTING PETITIONER.

INTEREST OF AMICI

The Offices of the Public Defender of Oklahoma County and of Tulsa County are statutorily created offices whose primary function is the representation of indigent criminal defendants in these two metropolitan areas. These offices represent thousands of indigent defendants each year, some of whom are charged with, and tried for, capital murder. In some of these cases, insanity is raised as a defense. Neither office receives funds for expert witnesses necessary for the preparation and defense of these cases. (Infra, p. 6-10).

The Oklahoma Criminal Defense Lawyer's Association (OCDLA) is a state wide, non-profit organization of over 200 practicing attorneys founded in 1976, dedicated to goals of professional excellence, protection of the rights of individuals, and promotion of justice through

law. Many members of the OCDLA are appointed to represent indigent accused persons for various criminal offenses, including capital murder. In some of these cases, the insanity defense is raised. These attorneys receive a token fee and no expense money for investigation of the case. (Infra at 6-11).

Amici are vitally interested in the principles laid down in this case regarding the right to funds to investigate and present an insanity defense, and to explore and investigate mitigating evidence in capital cases. Our vital interest in affirming the constitutional right to access to necessary funds in these areas led to our involvement in this case.

SUMMARY OF ARGUMENT

I. Oklahoma provides a small fee for attorneys appointed to represent indigent criminal defendants. It provides no funds

for these attorneys or public defenders in order that a serious insanity defense can be developed and presented. (point I.A., infra.) The manner in which Oklahoma has chosen to apply the insanity defense makes it extremely difficult, if not impossible, to prevail without the assistance of an expert witness. (point I.B., infra.) Denial of funds to obtain and present such an expert is violative of numerous constitutional guarantees. (point I.C. infra.)

II. Oklahoma trial judges have recognized the need to provide funding to indigent capital defendants in order to explore and present mitigating evidence. The Oklahoma Court of Criminal Appeals, though recognizing the usefulness of this evidence, has consistently denied these funds. This is a violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment, and contrary to Lockett v. Ohio,

438 U.S. 586 (1978).

ARGUMENT

I. WHEN AN INDIGENT DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY AT ISSUE, THE STATE MAY NOT CONSTITUTIONALLY DENY HIM THE MEANS TO ESTABLISH THE DEFENSE.

A. THE OKLAHOMA STATUTORY SCHEME PROVIDING DEFENSE COUNSEL FOR AN INDIGENT CRIMINAL DEFENDANT ALLOWS NO FUNDS FOR OBTAINING OR PRESENTING EXPERT WITNESSES IN SUPPORT OF THE INSANITY DEFENSE.

In Oklahoma, indigent criminal defendants are provided counsel for trial in one of three ways: (1) through the appointment of private counsel 1/, Title 22 Okl. Stat. §464, 1271; (2) appointment of the Office of the Public Defender in counties with a population exceeding 200,000, Title 19 Okl. Stat. §138.1 et. seq; or (3) through appointment in some counties of a part-time Public Defender.

1/ Such counsel may not refuse appointment. Refusal makes one subject to a contempt of court citation. Sontag v. State, 629 P.2d 1269 (Okl.Cr. 1981).

Title 19 Okl. Stat. §137.1; 138.4.

Although the State provides counsel to an indigent defendant, it provides NO funds for employment of experts for an insanity defense, or any other technical defense for that matter.

By statute, Oklahoma prosecuting attorneys are authorized to spend state funds for expert witnesses. Title 20 Okl. Stat. §1304(a)(b)(3). No reciprocal right to these funds is available under any circumstances for indigent defendants. This is true even where the court deems the evidence material and necessary, and orders these funds. 2/

2/ In State v. Paris Johnson, CRF-80-1081 and CRF-80-1082, the District Court, upon application of the defendant, ordered the Court Fund Board to pay \$500 to hire a chemist the court deemed necessary and material to the defendant's care. The Court Fund Board refused, the defendant filed a writ of mandamus in the Oklahoma Supreme Court. That court refused to assume original jurisdiction and denied petitioner's writ of mandamus. Public

Amici believes a refusal to grant expert funds despite a finding by a court that the expert testimony is necessary and material to the defense clearly offends due process when the State is entitled to hire these additional experts. Cf. Wardeus v. Oregon, 412 U.S. 470 (1973).

Mr. Ake was represented by a private attorney appointed by the court, and assisted by Canadian County's part-time Public Defender. By terms of Title 22 Okl.Stat. §§464, 1271, all court appointed attorneys in Oklahoma, in non-capital cases, are limited to a maximum fee of \$500 to \$600. See Bias v. State, 568 P.2d 1269

2/ cont. Defender of Oklahoma County, T. Hurley Jordan, and Assistant Public Defender of Oklahoma County, Robert A. Ravitz v. Court Fund of Oklahoma County, the Honorable Jack R. Parr, Dan Gray, Court Clerk, and the Honorable Charlie Y. Wier. (Case No. 55715 denied September 20, 1980).

(Okla. 1977).^{3/} In capital cases, an attorney is entitled to a maximum fee of \$2,500, the specific amount left to the discretion of the trial judge. Title 21 Okla.Stat. §701.13. The part-time Public Defender is limited to a salary of \$7,200.00 per annum to be paid monthly. Title 19 Okla. Stat. §138.4(b).

Although counsel received token compensation for his own fee and out of pocket expenses, NO funds for establishment of this serious insanity defense were provided to counsel for Mr. Ake. The Court of Criminal Appeals has foreclosed that possibility in all cases involving indigent defendants. The court summarized its view in Maghe v. State, 620 P.2d 433, 435 (Okla.Cr. 1980):

^{3/} Counsel may petition for "extraordinary out of pocket expenses" and "extraordinary professional services" if certain requirements are met. Bias, supra, at 1272. Amicus OCDLA is unaware of any attorney receiving a greater fee than that provided by statute.

"Admittedly, and as pointed out by the appellant, the assistance now sought at the state level is available to a federal indigent criminal defendant pursuant to subsection (e) of the Criminal Justice Act of 1964, as amended. 18 U.S.C.A. §3006 A(E)).

However, as noted in Hardt v. State, Okla.Cr. 490 P.2d 752 (1971), state legislators could appropriately provide impecunious defendants with this aid if deemed practical and in the public interest. In the absence of enabling legislation, we know of no judicial precedent, constitutional mandate, or statutory authority in Oklahoma obligating this state, at its expense, to make available to the appellant, in addition to counsel, the full paraphernalia of defense.

Capital cases are not even excluded from this rule. Davis v. State, 665 P.2d 1186, 1190 (Okla.Cr. 1983); Irvin v. State, 617 P.2d 588 (Okla.Cr. 1980).

Indigents represented by the Office of the Public Defender of Tulsa and Oklahoma

Counties fare no better. Although allowance is made by statute for office space and supplies, Title 19 O.S. §138.1, and salary for attorneys, Title 19 Okl. Stat. §138.4(a), 4/ secretaries, and investigators, Title 19 Okl. Stat. §138.6, the Oklahoma Court of Criminal Appeals has refused to provide funds to pursue the insanity defense or any defense requiring employment of an expert. See Davis, supra; Irvin, supra.

Thus, the denial in Mr. Ake's case was not an unusual one, but one which occurs with frequency in the state courts of Oklahoma.

4/ By terms of this statute, these salaries are equal to the salaries of the county's District Attorney and his assistants. Earl v. Tulsa County District Courts, 606 P.2d 545 (Okl.Cr. 1979).

B. OKLAHOMA RULES OF LAW AND PROCEDURE REGARDING THE INSANITY DEFENSE MAKE IT NEARLY IMPOSSIBLE TO PREVAIL WITHOUT THE AID OF EXPERT TESTIMONY.

Because of the manner in which Oklahoma law is administered, it is clear that an accused person cannot reasonably expect to prevail with an insanity defense -- no matter how strong-- without the aid of expert testimony. Without supporting expert testimony, this defense is practically doomed from the start.

Two reasons exist for this. First, Oklahoma uses a version of the M'Naghten Rule, 8 Eng. Rptr. 718 (HL 1843). The M'Naghten Rule (right/wrong test) is the most strict of all insanity tests. Oklahoma has consistently used M'Naghten since before statehood. In Maas v. Territory, 10 Okl. 714, 717, 63 P. 960, 961 (1901), the court said:

"The test of responsibility is fixed at the point where one

has the mental capacity to know that the act is wrong, and if one has sufficient mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act, he is responsible for the same."

This rule was codified by the first legislature in Revised Laws 1910 §2094, now Title 21 Okl. Stat. §152(4). Adair v. State, 6 Okl.Cr. 284, 118 P.416 (1911). Recently, in Jones v. State, 648 P.2d 1251, 1254 (Okl.Cr. 1982), cert. den. ____U.S.____, 103 S.Ct. 799, the Court of Criminal Appeals reiterated:

"The defendant must demonstrate at trial that during the commission of the crime he was suffering from mental disease or defect rendering him unable to differentiate between right and wrong, or unable to understand the nature and consequences of his acts."

This is the "exclusive" test for insanity in Oklahoma. See, Richardson v. State, 569 P.2d 1018, 1020 (Okl.Cr. 1977). Attempts to modify the rule have been rejected. See Tittle v. State, 44 Okl.Cr. 287, 280 P. 865 (1929) (irresistible impulse defense rejected); Gresham v. State, 489 P.2d 1355, 1357 (Okl.Cr. 1971) (diminished capacity defense implicitly rejected).

Second, Oklahoma procedures for establishing the insanity defense make it difficult to prevail to any degree without expert testimony. Although Oklahoma allows the opinion testimony of lay persons on this issue, 5/ Wilson v. State, 568 P.2d 1279 (Okl.Cr. 1977); High v. State, 401 P.2d 189 (Okl.Cr. 1965), this

5/ A predicate must be laid that the lay person had sufficient opportunity for observation of the accused. Supra.

evidentiary benefit is worthless as a practical matter. This is true because Oklahoma has long employed a presumption of sanity. Reed v. State, 23 Okl.Cr. 56, 212 P.441 (1923). In Munn v. State, 658 P.2d 482, 484 (Okl.Cr. 1983), the Court of Criminal Appeals explained:

The initial burden is on the defendant to establish a reasonable doubt as to his sanity. Once the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the state to prove beyond a reasonable doubt that the defendant could distinguish between right and wrong and therefore was sane at the time of the offense." (Emphasis Added). See also Whisenhunt v. State, 279 P.2d 366 (Okl.Cr. 1955).

Without expert testimony, this presumption is difficult, if not impossible, to overcome. In Garrett v.

State, 586 P.2d 754 (Okl.Cr. 1978), the defendant, an eighty year old woman, was convicted of manslaughter in the first degree. She testified that she remembered walking to the victim's home, arguing with the victim, and that the victim struck her. Id. at 755. She did not remember shooting anyone. Id. Other witnesses testified that the defendant "looked like 'she had gone berserk'" Id. and "'looked wild.'" Id. at 754. The Court of Criminal Appeals noted that this evidence "is not evidence that brings the defendant within the above rule to show that she did not know right from wrong. As we stated in Whisenhunt, 'until legal insanity was established there was not sufficient evidence to create that reasonable doubt required by the law shift the burden of proving defendant's sanity to the state.'" Id. at 756. In Wilson v. State, 568 P.2d

1279 (Okla. Cr. 1977), the defendant was charged with pointing a weapon at another after an altercation with airport guards when the defendant attempted to drive his car up an exit ramp. A lay witness testified that the defendant "was not a normal person", and stated the basis for that opinion. Id. at 1280. The defendant also testified, but was largely unresponsive, and confused. Id. However, the Court of Criminal Appeals said no reasonable doubt was raised as to the defendant's sanity. Id. at 1281. It also noted that the state produced expert psychiatric testimony. Id. 6/

6/ It is noteworthy that the defendant in this case was represented by a public defender, who, as shown at supra, p. 6-11 had not the funds to employ or call an expert of his own. -15-

Furthermore, reliance by the defendant on lay witnesses may prevent the jury from even considering the defense, as the court is not obligated to instruct on insanity unless a reasonable doubt as to sanity is raised. Bills v. State, 585 P.2d 1366 (Okla. Cr. 1978). Experience teaches that it is often harder for a lay witness to specifically testify whether one knew right from wrong at the time of his acts.

The problem of success in presenting an insanity defense without experts who can testify to the defendant's insanity at the time of the offense is illustrated by McFarthing v. State, 630 P.2d 324 (Okla. Cr. 1981). In McFarthing, the defendant was charged with robbery. He was represented by private counsel with no funds to hire an expert. At the time of the offense, he had been in and out of mental institutions, and two physicians testified his psychosis was

a recurring one, coming and going. Id. Other witnesses testified regarding his bizzare behavior. Id. at 324-325. Only the arresting officers testified that he seemed lucid to them. Id. McFarthing was convicted and sentenced to 15 years imprisonment. 7/

Thus, Oklahoma has chosen to apply the most strict of all insanity tests. At the same time it refuses to provide an indigent the financial means to meet this heavy burden. Such an incongruous policy should not be allowed to stand.

7/ The fundamental unfairness of this policy is best illustrated by the case of State v. Palmer, CRF-82-984, District Court of Oklahoma County, a case tried by Amicus Office of the Public Defender of Oklahoma County. Defendant was charged with Murder in the First Degree after he allegedly walked into a nursing home and stabbed an elderly lady to death. The defendant was a twenty year old indigent with no prior record. The defendant's family was able to obtain \$400 for the hiring of an expert psychiatrist. Upon testifying at trial regarding the drug of PCP which might have been involuntarily taken by the defendant

C. THE CONSTITUTION REQUIRES THAT IF AN INDIGENT CRIMINAL DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY IN DOUBT, HE MUST BE PROVIDED WITH THE NECESSARY MEANS TO OBTAIN AND PRESENT EXPERT TESTIMONY TO SUPPORT THAT DEFENSE.

Amici has shown above that in Oklahoma, Mr. Ake (and any indigent criminal defendant raising the insanity defense) faced nearly insurmountable odds in establishing a serious insanity defense without the aid of experts who could testify regarding his mental condition at the time of the offense. The barriers imposed by the State of Oklahoma are incompatible with our constitutional guarantees.

Amici agrees in full with the arguments

7/ cont. the night of the killing, and the effects of alcohol on an individual coupled with the doctor's opinion on the mental framework of the defendant, an Oklahoma jury convicted the defendant of the lesser included crime of manslaughter. Four hundred dollars to hire an expert prevented the breakdown in the adversarial process that our system counts on to produce just results. See Strickland v. Washington, ___ U.S. ___, slip op. p. 26 (1984).

advanced in Petitioner's Petition for Writ of Certiorari and Brief-in-Chief. With Petitioner, Amici argues that virtually every constitutional right available to an accused is violated when funds for expert witnesses are denied. Provisions related to equal protection, due process, effective assistance of counsel, and important Sixth Amendment rights to compulsory process for obtaining witnesses and confrontation of adverse witnesses require that indigent criminal defendants be provided with expert assistance where appropriate. Note, The Indigent's Right to an Adequate Defense: Expert In Investigational Assistance In Criminal Proceedings, 55 Cornell L.Rev. 632, 641-43 (1970).

Amici further notes that in denying funds of this nature on a constitutional basis, the Oklahoma Court of Criminal Appeals has relied on this Court's

pronouncement in United States ex rel Smith v. Baldi, 344 U.S. 561 (1953). Ake v. State, 663 P.2d 1, 6 (Okla. Cr. 1983); See also Irvin v. State, 617 P.2d 588, 594 (Okla. Cr. 1980). However, United States ex rel Smith v. Baldi is distinguishable. This Court held in Smith v. Baldi that where a Pennsylvania court had already appointed one psychiatrist to examine the accused as to his insanity at the time of the offense and where that psychiatrist gave testimony, there was no constitutional mandate for Pennsylvania to appoint a second psychiatrist after petitioner plead guilty, to provide information as to appropriate sentence. Id. at 568. In Oklahoma, the state is required to submit a defendant for pre-trial testing to determine his present competency only, 8/

8/ This is not meant to imply that commitment is automatic. The procedure involves the filing of a formal

not his legal sanity at the time of the offense. Title 22 Okl.Stat. §1175.1 et. seq. 9/ This clearly distinguishes Oklahoma's procedures from those in Baldi as Oklahoma defendants are given no opportunity whatsoever for psychiatric examination regarding mental state at the time of the offense. See n. 10, infra.

Denied state funded assistance, Mr. Ake was placed in the position of all Oklahoma indigents who raise the insanity defense. Although on trial for his life, he still

8/ cont. application, and the evidentiary hearing before one can be committed for observation. Title 22 Okl.Stat. §1125.3. Another hearing is required before one may be declared presently incompetent. Title 22 Okl.Stat. §1175.4, 1175.5.

9/ On at least one occasion, a judge ordered the state mental hospital to do psychological testing on a capital defendant. Legal counsel for the hospital told the parties that no statutory authority would allow them to comply with such an order. Davis v. State, supra. Motion Transcript Feb. 21, 1978 p. 10 (Appendix A). The hospital would not perform the tests.

could not surmount the obstacle of his indigency and offer expert evidence in support of his defense. This situation, all too common in Oklahoma, "in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity." Report of the Attorney General's Commission on Poverty in the Administration of Federal Criminal Justice, at 11 (1963).

II. AN INDIGENT DEFENDANT FACING THE DEATH PENALTY IS ENTITLED TO NECESSARY FINANCIAL ASSISTANCE TO PREPARE AND PRESENT RELEVANT MITIGATING EVIDENCE.

Petitioner's brief-in-chief insists that an indigent criminal defendant should be allowed means to present evidence in mitigation of punishment and in rebuttal of the state's evidence of aggravating circumstances. (Brief of Petitioner, P. ____). Amici wholeheartedly agree.

Amici point out to this court in addition that a capital defendant in Oklahoma is provided NO financial means to explore such mitigating evidence, much less to rebut the state's evidence in aggravation.

This court in Eddings v. Oklahoma, 455 U.S. 104 (1982) has most recently recognized that evidence of a defendant's character can be relevant mitigating evidence and must be presented to the trier of fact if it is available. See also, Lockett v. Ohio, 403 U.S. 586 (1978). Oklahoma's capital punishment statute directs the Court of Criminal Appeals in all cases to consider "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Title 21 O.S. §701.13(C)(3). The Oklahoma Court of Criminal Appeals in Cox v. State, 644 P.2d 1077, 1079 (Okla. Cr. 1982), noted:

"A mitigating circumstance for the jury to consider is whether 'the murder was committed while the defendant was under the influence of mental or emotional disturbance.' Additionally, the trial judge is required, independent of the jury's determination, to consider whether the defendant's physical or mental condition calls for special consideration.

Even if the defendant is determined to be legally sane, he should be afforded the opportunity to introduce evidence of his mental condition at the punishment stage. Psychiatric testimony of the defendant's mental or emotional state at the time of the killing may very likely influence the jury's decision as to whether to recommend a life sentence or a sentence of death." 10/

10/ Cox had been convicted of two counts of murder in the first degree and sentenced to death. On appeal, the Court of Criminal Appeals reversed the conviction for failure

Incredibly, the Court of Criminal Appeals, despite this statement, affirmed the denial of funds to Cox for establishing

10/ cont. to commit the defendant for observation to determine present competency. On retrial, Amicus Office of the Public Defender of Oklahoma County represented Cox. Cox was convicted of murder in the first degree and received a life sentence on one count and sentenced to twenty-five years on a conviction of manslaughter on the other count.

The Cox decision clearly demonstrates the dilemma an Oklahoma criminal defense lawyer faces. By statute and the Cox decision, defense counsel must reasonably believe his client is presently incompetent to stand trial before he can ethically recommend commitment. Cox v. State, supra at 1078-79. Absent this reasonable belief, the attorney can not ethically seek commitment, no matter how strong the evidence of mental or emotional deficiency, or retardation short of present incompetency. A lawyer cannot compel commitment and establish mitigating evidence which could amount to a sentence of less than death. The jury is never presented relevant mitigation evidence which could effect its decision and thus insure reliability in sentencing.

this mitigating evidence. Id. at 1077. 11/ Irvin v. State, supra; Davis v. State, supra.

"Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if funds available for compelling the evidence are unavailable." Westbrook v. Zant, 704 F.2d 1481, 1496 (11th Cir. 1983). In Oklahoma, indigent defendants are precluded financially from developing psychiatric evidence for use in mitigation of punishment at the second stage of trial. It is undisputed that evidence of mental disturbance less than insanity is a valid mitigating circumstance. Eddings v. Oklahoma, supra. See also Estelle v. Smith, 451 U.S. 454

11/ A capital defendant is not even entitled to a pre-sentence investigation report, a right available to most non-capital defendants. See, Title 22 Okl.Stat. §982. Smith v. State, 594 P.2d 784 (Okl.Cr. 1979).

(1981). United States ex rel Smith v. Baldi, supra at 573 (Frankfurter, J., dissenting). Funds should be provided upon a reasonable showing of need to procure valid mitigating evidence.

In this regard, the court is directed to its decision in Bounds v. Smith, 430 U.S. 817 (1977). In Bounds, this Court held, "the cost of protecting a constitutional right cannot justify its total denial." Id. at 825. In Bounds, the issue was whether state prison inmates are entitled to assistance by the State in pursuing legal remedies. The court held that requiring the expenditure of state funds is necessary to provide a person's Fourteenth Amendment right of access to the courts. Surely if a person is entitled to expenditure of funds to guarantee his right to the courts, a capital defendant is entitled to funds to prove his execution

would constitute a cruel and unusual punishment due to the peculiarities of his character and upbringing. Thus, Bounds, when read in conjunction with Lockett, requires the allowance of funds to the defendant to investigate mitigation evidence.

Even without Bounds, Lockett v. Ohio by its own terms requires this result. 12/

Oklahoma provides no authorization of

12/ "There is no perfect procedure for deciding in which cases governmental authorities should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to the aspects of the defendant's character and record into circumstances of the offense proffered in mitigation, creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Id. at 605.

funds to allow an indigent defendant to pursue and present relevant mitigating evidence. This result is totally incompatible with the spirit, if not the dictate, of Lockett. Several Oklahoma trial judges, experienced with capital sentencing evidence and procedures, believe this to be so. See Appendix A, Davis v. State, Motion Hearing Transcript February 21, 1978; Appendix B, Johnson v. State, Motion Hearing Transcript, January 28, 1982.

CONCLUSION

Denial of funds for expert psychiatric testing denied appointed counsel the ability to present a serious insanity defense, or to rebut the state's allegation of aggravating circumstances. (Brief for petitioner at p. ____). This situation is common for most indigent accused persons in Oklahoma who raise a necessary and substantial insanity defense requiring

expert testimony. This deprivation is constitutionally infirm on multiple constitutional grounds, and the judgment and sentence of the Oklahoma court must be vacated and remanded with directions to afford petitioner these rights.

Respectfully submitted,

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APPENDIX

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APPENDIX A

STATE V. DAVIS, CRF-77-2905, 2906

Motion Hearing, dated Feb. 21, 1978, before the Honorable David Cook, District Judge:

THE COURT: Is there anything you can stipulate in regard to what was said or done at that hearing?

MR. STUART: Your Honor, I believe we can stipulate that Judge Hunter's order was to the effect that that be done and him sent to Central State for psychological testing or educational evaluation if it could be done on Monday and him sent down there and back prior to Tuesday. That is as far as I will stipulate.

MRS. JOPLIN: Excuse me. After we left Judge Hunter's courtroom, Mr. Stuart and I called Central State and talked to Mike Cain who is legal counsel for Central State, who told both of us that there was no statutory authority that would allow them to comply

with such an order. They said they couldn't do it.

MR. STUART: I will so stipulate that Mr. Cain did say that...

9Tr. p. 10, L. 9 - 24.

THE COURT: Judge, again, we appreciate your courtesy in coming in and supplying the record which wasn't made before you last Friday afternoon. I would like to be advised of what did occur...

[DISTRICT] JUDGE [STEWART M. HUNTER]: As I recall it was a motion for funds to hire an expert witness to testify in mitigation. The gist of it being that he wanted to get a psychiatrist or psychologist to examine the defendant and then testify in mitigation presuming the trial reached that point.

My feeling was that if defendant had sufficient funds of his own and was incarcerated. I would order him to be made available for an examination by his own private psychiatrist. I felt that an

indigent should be entitled to the same thing if it is available. And my intent was to order him to be made available for an examination by a State psychiatrist because there are no state funds available to my knowledge for expert witnesses in either event. My thinking was that it's not one of those things that is necessarily necessary, but it would sure be nice to have if you were a defendant in a first degree murder case.

THE COURT: Thank you, Judge.

(Tr. p. 23, L. 22 through p. 24, L. 18).

APPENDIX B

STATE V. JOHNSON, CRF-81-4939

Motion Hearing, dated Jan. 28, 1982, before
the Honorable Joe Cannon District Judge:

(Regarding Motion for Independent
Psychological Evaluation)

THE COURT: You can't hire--you can't
hire investigators and you can't hire experts
and all that and you talked me into--one day
of ruling that again. And I think you're
right on the law. And I knew--I know you're
right.

But the trouble of it is, there's three
fellows out there on the State Capitol that
say that that's not the law. And you took it
out there and they overruled you--and they
overruled me, not you. And I think they're
flirting with dynamite...

...Be overruled. (Tr. p. 16, L. 9-20).

MR. RAVITZ: For the record, Judge, I
would like to state that I don't have any

funds. My client's indigent...

THE COURT: Well, for whatever its worth,
Ravitz...I agreed with you a year ago, I
agree with you now...

And you're not--I cannot legally give you
those funds. And what the Supreme Court of
the United States is going to say about it
one of these days is another ball game. But
I can't do that. And the Court of Criminal
Appeals told me that you can't do this. I've
got to follow them. (Tr. p. 18, L. 1-14).

* * *

THE COURT: You've got to convince them
[the Court of Criminal Appeals] out there.
That's who you've got to convince.

MR. RAVITZ: I've tried.

THE COURT: Take it on up to the Supreme
Court of the United States. (Tr. p. 20, L.
1-5).

MOTION FILED
JUN 1 - 1984

No. 83-5424

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

GLEN BURTON AKE,
Petitioner,
v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE
TO FILE BRIEF OF *AMICI CURIAE* AND
BRIEF OF *AMICI CURIAE*
AMERICAN PSYCHOLOGICAL ASSOCIATION
AND
OKLAHOMA PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER

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June 2, 1984

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**ALTERNATIVE STATEMENT
OF
QUESTIONS PRESENTED**

Amici believe that the questions presented by the facts of *Ake v. State of Oklahoma* are the following:

1. Does the Constitution require a state to pay for a psychological evaluation of defendant's state of mind at the time of the offense where the defendant (1) is charged with a capital crime; (2) has pleaded insanity as his only defense; (3) has the burden of establishing a reasonable doubt as to his sanity; (4) has been found by state mental health experts to be mentally ill, incompetent to stand trial, dangerous, and incapable of determining right from wrong, less than six months after the crime; and (5) is indigent?

2. Does the Constitution require a state to provide an indigent defendant with the expert assistance necessary to cross examine and rebut expert testimony regarding his future dangerousness presented by the state to support the death penalty?

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IN SUPPORT OF PETITIONER**

Pursuant to Rule 36.3 of the Rules of this Court, the American Psychological Association (hereafter "APA") and the Oklahoma Psychological Association (hereafter "OPA") move for leave to file the attached brief *amici curiae*.

The reasons supporting the granting of this motion and the issues which *amici* are uniquely qualified to address

(iii)

are set forth in the statement of interest of *amici* in the attached brief.

The APA has filed *amicus curiae* briefs in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the rights of mentally retarded inmates); *Blue Shield v. McCready*, 457 U.S. 465 (1982) (the standing of an insured patient receiving psychotherapy to sue under the Clayton Act); *Mills v. Rogers*, 457 U.S. 291 (1982) (the right of a competent committed mental patient to refuse psychotropic drugs); *Metropolitan Edison Co. v. People Against Nuclear Energy*, — U.S. —, 103 S. Ct. 1556 (1983) (the cognizability of psychological harm under the National Environmental Policy Act); *City of Akron v. Akron Center for Reproductive Health, Inc.*, — U.S. —, 103 S. Ct. 2481 (1983) (abortion counseling by non-physicians); and *State of New York v. Uplinger*, — U.S. —, — U.S.L.W. — (May 30, 1984) (deviant sexual conduct).

Petitioner has consented to the filing of this brief, and his letter is being filed with the clerk of this Court. Consent was requested of respondent, but has been denied. *Amici* respectfully submit that they have important, relevant expertise and information to contribute to the Court that will be useful in deciding this case, and that will not be provided by the parties.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
ALTERNATIVE STATEMENT OF QUESTIONS PRESENTED	i
MOTION FOR LEAVE TO FILE BRIEF OF <i>AMICI CURIAE</i>	iii
TABLE OF AUTHORITIES	viii
INTEREST OF <i>AMICI</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. DEFENDANT WAS CONSTITUTIONALLY ENTITLED TO A STATE FINANCED PSYCHOLOGICAL EVALUATION TO GIVE HIM AN ADEQUATE OPPORTUNITY TO SUPPORT HIS INSANITY PLEA	6
A. Due Process Requires that a Defendant be Provided a Psychological Evaluation of his State of Mind at the Time of the Offense Where the Defendant (1) Is Charged With a Capital Offense; (2) Has Pleaded Insanity as his Only Defense; (3) Bears the Burden of Overcoming a State Imposed Presumption of Sanity; (4) Has Been Determined by State Experts and/or a State Court to be Mentally Ill, Dangerous, Incompetent and Incapable of Telling Right from Wrong, Less Than Six Months After the Offense; and (5) Is Indigent	6
1. The Constitution Requires the Highest Standards of Procedural Fairness in Capital Cases to Minimize the Possibility of Erroneous Determinations	6

TABLE OF CONTENTS—Continued

	Page
2. The Possibility of an Erroneous Determination of Criminal Responsibility Was Unacceptably High Where the Defendant Was Denied a Psychological Evaluation after He Had Pleaded Insanity and State Experts Had Found Him Mentally Ill, Less Than Six Months After the Crime....	7
3. Having Created The Right To Plead Insanity, Oklahoma Must Accord Due Process And Other Constitutional Guarantees to those Seeking to Exercise that Right	14
B. The Information and Opinions Provided by Qualified Mental Health Professionals are Relevant and Useful to the Trier of Fact....	15
1. The Factfinder Can Profit from Expert Testimony Regarding the Nature and Severity of Claimed Psychological Dysfunction and From Informed Estimates of the Defendant's Knowledge, Perception and Motivation at a Given Time	15
2. Professional Psychologists Are Qualified to Provide Forensic Psychological Evaluations and to Testify as Experts in Criminal Trials	18
C. Requiring The State to Provide Indigent Defendants a Psychological Evaluation Would Not Place an Unreasonable Procedural or Financial Burden on the State	23
1. The Procedure For Providing Indigent Defendants An Expert Mental Health Evaluation Need Not be Burdensome.....	23
2. The Cost of Providing Indigent Defendants an Expert Mental Health Evaluation Would Not Be Unduly High	25

TABLE OF CONTENTS—Continued

	Page
II. WHERE THE STATE HAS RELIED ON EXPERT PREDICTIONS OF DANGEROUSNESS TO ESTABLISH AGGRAVATING CIRCUMSTANCES SUPPORTING THE DEATH PENALTY, IT MAY NOT DENY AN INDIGENT DEFENDANT THE ASSISTANCE OF A MENTAL HEALTH PROFESSIONAL TO EFFECTIVELY CROSS-EXAMINE AND REBUT SUCH TESTIMONY	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	9
<i>Ake v. State</i> , 663 P.2d 1 (Okla. Crim. App. 1983) ..	8, 9,
	23, 25
<i>Barefoot v. Estelle</i> , — U.S. —, 51 U.S.L.W.	
5189 (July 6, 1983)	<i>passim</i>
<i>Blue Shield v. McCready</i> , 457 U.S. 465 (1982)	20
<i>Boddie v. Connecticut</i> , 401 U.S. 378 (1971)	14
<i>Bush v. McCollum</i> , 231 F. Supp. 560 (N.D. Tex.	
1964), <i>aff'd</i> , 344 F.2d 672 (5th Cir. 1965)	9
<i>California v. Ramos</i> , — U.S. —, 51 U.S.L.W.	
5220 (1983)	26
<i>Carter v. State</i> , 376 P.2d 351 (Okla. Crim. App.	
1962)	21
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	24
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	6, 27
<i>Evans v. Bennett</i> , 440 U.S. 1301 (1979)	7
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	7
<i>Gardner v. Florida</i> , 430 U.S. 349 (1976)	6
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	14
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1955)	14
<i>Hidden v. Mutual Life Insurance Co.</i> , 217 F.2d	
818 (4th Cir. 1954)	21
<i>Hovey v. Elliott</i> , 167 U.S. 409 (1897)	14
<i>Jenkins v. United States</i> , 307 F.2d 637 (D.C. Cir.	
1962) (<i>en banc</i>)	21
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976)	27
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	6
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422	
(1982)	14
<i>PASE v. Hannon</i> , 506 F. Supp. 831 (N.D. Ill.	
1980)	22
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979)	29
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966)	24
<i>People v. Hawthorne</i> , 293 Mich. 15, 291 N.W. 205	
(1940)	21
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	6, 14
<i>Richardson v. State</i> , 569 P.2d 1018 (Okla. Crim.	
App. 1977)	9

TABLE OF AUTHORITIES—Continued

	Page
<i>Rogers v. State</i> , 634 P.2d 743 (Okla. Crim. App.	
1981)	8, 21
<i>Smith v. Baldi</i> , 344 U.S. 561 (1952)	8, 11
<i>Springer v. Collins</i> , 444 F. Supp. 1049 (D. Md.	
1977)	9
<i>Strickland v. Washington</i> , — U.S. —, 52	
U.S.L.W. 4565 (May 14, 1984)	7, 14, 26
<i>United States v. Edwards</i> , 488 F.2d 1154 (5th Cir.	
1974)	9
<i>Virginia Academy of Clinical Psychologists v. Blue</i>	
<i>Shield of Virginia</i> , 624 F.2d 476 (4th Cir. 1980),	
<i>cert. denied</i> , 450 U.S. 916 (1981)	20
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	14
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) ...	7
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)	9
UNITED STATES CONSTITUTION:	
Sixth Amendment	9, 10, 14
Eighth Amendment	28
Fourteenth Amendment	<i>passim</i>
STATUTES AND REGULATIONS:	
<i>Code of Federal Regulations:</i>	
Civilian Health and Medical Program of the Uni-	
formed Services (CHAMPUS), 10 U.S.C. § 1071	
et seq. (1976)	20
Comprehensive Employment and Training Act, 29	
U.S.C. §§ 801 et seq. (1976)	20
Disaster Relief Act, 42 U.S.C. § 5183 (1976)	20
Federal Employee Health Benefits Program, 5	
U.S.C. § 8902(k) (1976)	20
Federal Employees Compensation Act, 5 U.S.C.	
§ 8101(2) (1976)	20
Health Maintenance Organization Act, 42 U.S.C.	
§ 300e-1 (1976)	20
Veterans Health Care Expansion Act, 38 U.S.C.	
§ 613(b) (1976)	20
Vocational Rehabilitation Act, 29 U.S.C. § 723	
(a) (1) (1976)	20
29 C.F.R. § 94.4(bb) (1978)	20

TABLE OF AUTHORITIES—Continued

	Page
32 C.F.R. § 199.12(c) (3) (iii) (a) (1981)	20
42 C.F.R. § 38.2(e) (1980)	20
42 C.F.R. §§ 110.101, 110.104 (1980)	20
21 Okla. Stat. § 152 (1983)	7, 8, 14
21 Okla. Stat. § 701.10 (1983)	27
21 Okla. Stat. § 701.12(7) (1983)	27
22 Okla. Stat. § 1175.2 (1983)	24
36 Okla. Stat. § 2652 (1976)	20
36 Okla. Stat. § 6055 (1976)	20
59 Okla. Stat. §§ 1351-1375 (1971)	19
Rule 403, Fed. R. Evid.	18
Rule 701, Fed. R. Evid.	18
Rule 703, Fed. R. Evid.	17, 18
Rule 704, Fed. R. Evid.	18
MISCELLANEOUS:	
20 Am. Jur. 2d Evidence § 866.5 (1964)	17
AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, FIRST TENTATIVE DRAFT CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Section 7-3.3 (July 1983)	10, 15, 24
AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL III (3rd ed. 1980)	13
A. ANASTASI, PSYCHOLOGICAL TESTING (4th ed. 1976)	22
ANNUAL REPORT OF THE UNIVERSITY OF VIRGINIA FORENSIC EVALUATION, TRAINING AND RESEARCH CENTER (1982)	25
APA CRITERIA FOR ACCREDITATION OF DOCTORAL TRAINING PROGRAMS AND INTERNSHIPS (Jan. 1979)	19
APA, ETHICAL PRINCIPLES OF PSYCHOLOGISTS, 36 AM. PSYCHOL. 633 (1981)	19
APA, RECOGNITION AND REIMBURSEMENT FOR PSYCHOLOGICAL SERVICES (1983)	20
APA, STANDARDS FOR PROVIDERS OF PSYCHOLOGICAL SERVICES, 32 AM. PSYCHOL. 495 (1977)	19

TABLE OF AUTHORITIES—Continued

	Page
Bonnie and Slobogin, <i>The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation</i> , 66 VA. L. REV. 427 (1980)	9, 10, 16, 17, 21
Comment, <i>The Psychologist as an Expert Witness</i> , 15 KAN. L. REV. 88 (1966)	21-22
H. DAVIDSON, FORENSIC PSYCHIATRY 35 (2d ed. 1965)	16
Diamond & Louisell, <i>The Psychiatrist as an Expert Witness; Some Ruminations and Speculations</i> , 63 MICH. L. REV. 1335 (1965)	17
EIGHTH MENTAL MEASUREMENTS YEARBOOK (O. Buros, ed. 1978)	22
Ennis & Litwack, <i>Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom</i> , 62 CALIF. L. REV. 693 (1974)	22, 28
Ewing, <i>Dr. Death and The Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Cases</i> , 8 A. J. LAW & MED. 407 (1983)	28
S. FREUD, <i>Psycho-analysis and the Establishment of the Facts in Legal Proceedings</i> , in 9 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 103 (std. ed. J. Strachey 1959) (originally published in 1906)	21
Gass, <i>The Psychologist as Expert Witness</i> , 38 MD. L. REV. 539 (1979)	21, 22, 28
A. GOLDSTEIN, THE INSANITY DEFENSE 19 (1967) ..	16, 18
Hess, <i>Entry Requirements for Professional Practice of Psychology</i> , 32 AM. PSYCHOL. 365 (1977) ..	19
Kozol, Boucher & Garafolo, <i>The Diagnosis and Treatment of Dangerousness</i> , 18 CRIME & DELINQUENCY 371 (1971)	28
LAHMAN, LICENSURE REQUIREMENTS FOR PSYCHOLOGISTS: USA AND CANADA (1978)	19
Lassen, <i>The Psychologist as an Expert Witness in Assessing Mental Disease or Defect</i> , 50 A.B.A. J. 239 (1964)	21

TABLE OF AUTHORITIES—Continued

	Page
Levine, <i>Psychologist as Expert Witness in "Psychiatric" Questions</i> , 20 CLEV. ST. L. REV. 235 (1955)	21
Levitt, <i>The Psychologist: A Neglected Legal Resource</i> , 45 IND. L. J. 82 (1969)	21
Louisell, <i>The Psychologist in Today's Legal World</i> , 39 MINN. L. REV. 235 (1955)	21
Model Penal Code §§ 2.04, 2.08 (Proposed Official Draft, 1962)	10
Morse, <i>Failed Explanations and Criminal Responsibility: Experts and the Unconscious</i> , 68 VA. L. REV. 971 (1982)	22
Monahan, <i>The Predictions of Violent Behavior; Developments in Psychology and Law</i> , THE MASTERS LECTURE SERIES: PSYCHOLOGY AND THE LAW 147 (Scheirer and Hammonds, ed. 1982)	28
H. MUNSTERBERG, <i>ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME</i> (1908)	21
Nash, <i>Parameters and Distinctiveness of Psychological Testimony</i> , 5 PROF. PSYCHOL. 239 (1974)	21
Note, <i>A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings</i> , 90 YALE L. J. 889 (1981)	6
Note, <i>Psychologist's Diagnosis Regarding Mental Disease or Defect Admissible on Issue of Insanity</i> , 8 VILL. L. REV. 119 (1962)	21
Pacht, Kuehn, Bassett & Nash, <i>The Current Status of the Psychologist as an Expert Witness</i> , 4 PROF. PSYCHOL. 409 (1973)	21
Perlin, <i>The Legal Status of the Psychologist in the Courtroom</i> , in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26 (G. Cooke, ed. 1980)	21, 22
Radin, <i>Cruel Punishment and Respect for Persons: Super Due Process For Death</i> , 53 CAL. L. REV. 1143 (1980)	6
Rice, <i>The Psychologist as Expert Witness</i> , 16 AM. PSYCHOL. 691 (1961)	21

TABLE OF AUTHORITIES—Continued

	Page
Sadoff, <i>Working with the Forensic Psychologist</i> , in THE ROLE OF THE FORENSIC PSYCHOLOGIST 106 (G. Cooke, ed. 1980)	23
S. SALTZBURG & K. REDDEN, <i>FEDERAL RULES OF EVIDENCE MANUAL</i> 425 (2d ed. 1977)	17
Steadman & Cocozza, <i>Psychiatry, Dangerousness and the Repetitively Violent Offender</i> , 69 J. CRIM. LAW & CRIMINOLOGY 226 (1978)	28
Stigall, <i>Licensing and Certification</i> , in PROFESSIONAL PSYCHOLOGIST'S HANDBOOK (B. Sales ed., 1983)	19

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

No. 83-5424

GLEN BURTON AKE,
Petitioner,
v.
STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

**BRIEF OF AMICI CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
AND
OKLAHOMA PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER**

INTEREST OF AMICI

The American Psychological Association (APA), a non-profit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 55,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

A substantial number of APA's members are concerned with clinical and forensic psychology, including the collection of data, development of research, and evaluation of the state of mind of criminal offenders.

The Oklahoma Psychological Association (OPA) is a nonprofit, scientific, and professional organization that was founded in 1946 for the purpose of advancing the science and profession of psychology and to promote human welfare. It represents the majority of psychologists in Oklahoma and is affiliated formally with the APA.

Psychologists in Oklahoma come from accredited universities across the United States. Their work encompasses basic and applied research, teaching, and a myriad of mental health services to hospitals, courts, clinics, schools, and the community at large. Many of Oklahoma's psychologists offer expert testimony in court proceedings where the person's mental or emotional state is an issue. An even larger number are involved in the study, diagnosis, and treatment of mental and emotional disorders and the effects of such disorders on human behavior. In this way, Oklahoma psychologists, like psychologists nationally, bring unique qualifications to matters bearing on the case at hand. Because this case originated in Oklahoma, and because Oklahoma psychologists are committed to the promotion of public welfare, OPA, representing psychology in Oklahoma, joins the APA as *amicus*.

Amici wish to specify that they have no direct knowledge of the guilt, innocence, sanity, or insanity of the defendant in this case, and that they in no way, implied or otherwise, condone the heinous nature of the crimes involved. Their interest as *amici* is in providing information which it is hoped will be helpful to the Court in its consideration of the questions being addressed.

The APA contributes *amicus* briefs to this Court only where the APA has special knowledge to share with the

Court. The APA regards this as one of those cases. In this instance, the APA and OPA wish to inform the Court about the nature of psychological evaluations and the need for and uses of expert testimony in insanity defense proceedings. APA and OPA believe that this information will be of assistance to the Court in deciding this case.

SUMMARY OF ARGUMENT

This case presents the Court with an important but narrow question. It is whether due process or other constitutional guarantees require the state of Oklahoma to provide defendant Ake with the means of securing an expert psychological evaluation of his state of mind at the time he committed the offense, so that he will have an adequate opportunity to support his claim of insanity and so that he can rebut testimony about aggravating circumstances presented by state experts. The only question posed by the facts of this case is whether a defendant is entitled to such an evaluation when he is indigent, is charged with a capital crime, has pleaded insanity as his only defense, bears the burden of overcoming a state imposed presumption of sanity, and has been determined by state experts and/or a state court to be mentally ill, dangerous, incompetent to stand trial, in need of psychiatric treatment, and incapable of determining right from wrong, less than six months after committing the offense. *Amici* respectfully suggest that this Court need not determine which of these circumstances is either necessary or sufficient for such a requirement, but only that all these factors together warrant imposing on the state the minimal procedural and financial burden of paying for the psychological evaluation and assistance requested.

The Court has long recognized the special nature of capital cases and has interpreted the Constitution to require adherence to the highest standards of procedural fairness to minimize the possibility in such cases of er-

roneous determinations of criminal responsibility and excessive punishments. In this case, there is no doubt that the defendant committed the heinous offenses with which he is charged. However, there is serious question whether the defendant had sufficient understanding of the wrongfulness of his offenses to be criminally responsible for them under the laws of Oklahoma. *Amici* submit that fundamental fairness requires the state to provide defendant Ake an adequate opportunity to establish his insanity defense.

In this case, the insanity defense was Ake's only defense. In Oklahoma, the insanity defense is unlike other defenses, in that it is an affirmative defense, requiring the defendant to come forward with evidence creating a reasonable doubt about his sanity at the time of the offense before the prosecution is required to prove the defendant's sanity. Defendant was unable to sustain that burden without a psychological evaluation. More important, less than six months after the offense, Ake had been determined by state experts and by a state court to be mentally ill and incompetent to stand trial. *Amici* believe these findings indicate an unacceptably high risk of an erroneous determination in this case that defendant was sane at the time of the offense, unless the trier of fact has the benefit of information which would be provided by a psychological evaluation.

Amici submit that appropriate psychological evaluations provide relevant and probative information and opinions long recognized as admissible under federal and state rules of evidence. Although lay witnesses can also testify as to relevant facts and give their opinions about a defendant's sanity, the detection and diagnosis of mental disorders and the assessment of facts relevant to mental processes is recognized to be well beyond the competence of most lay people. *Amici* believe that the mini-

mal procedural burden, delay and expense required to provide indigent, mentally ill defendants in capital cases with psychological evaluations performed by qualified mental health professionals to support their only defense to the charges against them is a small price to pay to maintain the integrity of our criminal process.

In addition, this Court has consistently held that where a state creates a right, such as the right to plead insanity, the state may not be arbitrary in the recognition of the right. *Amici* believe that to deny defendant an adequate opportunity to support his plea of insanity, solely because of his indigency, was to arbitrarily and effectively deprive defendant of the benefit of the insanity defense in violation of due process of law and other constitutional guarantees.

Finally, *amici* agree with the weight of professional opinion that mental health experts have substantially less ability to predict future behavior than they do to assess current or past mental conditions. Knowing this opinion, this Court nevertheless held in *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189 (1983), that expert predictions of dangerousness are admissible, even if unreliable, because such testimony will be submitted to cross-examination and rebuttal before it is weighed by the jury. In the present case, the state relied on the testimony of two state psychiatrists that defendant is likely to be dangerous in the future to support its request for the death penalty. But the state denied defendant the means to effectively cross-examine or rebut such testimony. The rationale of *Barefoot* surely requires that where the state presents such unreliable testimony, the defendant must be provided the means to challenge it.

Amici urge the Court to reverse the holding of the Oklahoma Court of Criminal Appeals and to remand this case for a new trial.

ARGUMENT

I. DEFENDANT WAS CONSTITUTIONALLY ENTITLED TO A STATE FINANCED PSYCHOLOGICAL EVALUATION TO GIVE HIM AN ADEQUATE OPPORTUNITY TO SUPPORT HIS INSANITY PLEA.

A. Due Process Requires that a Defendant be Provided a Psychological Evaluation of his State of Mind at the Time of the Offense Where the Defendant (1) Is Charged With a Capital Offense; (2) Has Pleaded Insanity as his Only Defense; (3) Bears the Burden of Overcoming a State Imposed Presumption of Sanity; (4) Has Been Determined by State Experts and/or a State Court to be Mentally Ill, Dangerous, Incompetent and Incapable of Telling Right from Wrong, Less Than Six Months After the Offense; and (5) Is Indigent.

1. *The Constitution Requires the Highest Standards of Procedural Fairness in Capital Cases to Minimize the Possibility of Erroneous Determinations.*

At least since 1932, when *Powell v. Alabama*, 287 U.S. 45, 71 (1932) was decided, this Court has consistently ruled that "death is different," and that the profound difference between death and all other punishments gives rise to a corresponding difference in the procedural requirements that must be met before a sentence of death can be imposed. This rule is firmly established.¹ Indeed, either in a majority opinion, plurality opinion, concurring opinion, or dissent, every member of this Court has acknowledged that death is different, and that capital cases require heightened procedural protections.²

¹ See generally, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L. J. 889, at 889-890 and 902-903 (1981); and Radin, *Cruel Punishment and Respect for Persons: Super Due Process For Death*, 53 CAL. L. REV. 1143 (1980); and the cases and authorities cited therein.

² See *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (O'Connor, J.); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1976) (Stevens, J.), and 363-364 (White, J.); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)

In this case, the possibility for error in determining defendant Ake's criminal responsibility for the admitted homicides increased when the trial court refused to provide the defendant with a psychological evaluation of his state of mind at the time he committed the offense. There was no expert testimony of any kind concerning the defendant's state of mind at the time he committed the offense and whether he was capable of knowing the wrongfulness of his act at that time.³

Without testimony by expert witnesses, the jury was left to its own speculation as to Ake's state of mind. No witness experienced in assessing factual data related to mental conditions, motivation, and perception, provided the jury with informed opinion as to whether the defendant's actions at the time of the murders were consistent with an understanding of the wrongfulness of his conduct. Nor was there any expert testimony regarding the effect of drugs and alcohol on his mental processes or his likely perception of the situation in which the murders were committed.

(Burger, C. J.); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Powell & Stevens, J.J.), and 323 (Rehnquist, J.); *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J.), and 358-360 (Marshall, J.); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice); *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189, 5198 (1983) (Marshall & Brennan, J.J.), 5202 (Blackmun, Brennan & Marshall, J.J.); and *Strickland v. Washington*, — U.S. —, 52 U.S.L.W. 4565, 4570 (1984) (O'Connor, J.), 4575 (Brennan, J.), and 4578 (Marshall, J.).

³ Under Oklahoma law, culpability does not attach to the commission of an offense where the perpetrator at the time of the offense was "incapable of knowing" the wrongfulness of the act he committed. Okla. Stat. tit. 21, § 152 (1983). Each of the three experts who interviewed Ake prior to his trial testified that he had not been asked to evaluate Ake's state of mind at the time of the offense, had not done so, and therefore had no opinion on that issue.

2. The Possibility of an Erroneous Determination of Criminal Responsibility Was Unacceptably High Where the Defendant Was Denied a Psychological Evaluation after He Had Pleaded Insanity and State Experts Had Found Him Mentally Ill, Less Than Six Months After the Crime.

This is not a case in which a defendant asked for a court-appointed psychological evaluation for the purpose of determining whether to plead an insanity defense. Nor is it a case in which the defendant rejected the evaluation of a court-appointed expert and sought an expert of his own choosing. See *Smith v. Baldi*, 344 U.S. 561 (1952). Whether the Constitution requires the provision of state financed evaluations to indigent defendants in such situations are questions for another day. In this case, the question is whether the state must provide a psychological evaluation where the defendant has already entered an insanity plea, is indigent and has asked the court to appoint an expert selected by the court.

An expert psychological evaluation was necessary in this case to assist the defendant to overcome the presumption of sanity imposed by the state. In Oklahoma, as in many other jurisdictions, insanity is an affirmative defense. The defendant bears the burden of overcoming a presumption of sanity by producing sufficient evidence to raise a reasonable doubt as to his sanity at the time of the offense.⁴ Only if he meets this burden must the

⁴ Okla. Stat. tit. 21, § 152 (1983) provides that "[a]ll persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them, they were incapable of knowing its wrongfulness." The Oklahoma Court of Criminal Appeals has determined that "[i]n every case there is an initial presumption of sanity. This presumption remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State." *Ake v. State*, 663 P.2d 1, 10 (Okla. Crim. App. 1983); *Rogers v. State*,

prosecution prove his sanity beyond a reasonable doubt. Therefore, access to expert psychological testimony is particularly important. In fact, an expert psychological evaluation may in many cases, like the one at bar, be the only evidence sufficient to meet this burden. The denial of an evaluation in such a case, then, would relieve the state of the burden of putting on any evidence of defendant's sanity and the burden of proving beyond a reasonable doubt that the defendant was sane.

As this Court has recognized in other contexts, expert psychological assessments of mental conditions are of considerable probative value, and in some situations are indispensable. *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of adults); *Parham v. J.R.*, 442 U.S. 584 (1979) (civil commitment of children); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (right to habilitation as incident to right to safety and freedom from harm). Some lower federal courts and state courts have recognized that the value of information elicited through psychological evaluations is so relevant and probative in some situations that failure to secure it amounts to ineffective assistance of counsel in violation of the Sixth Amendment. See, e.g., *Bush v. McCollum*, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965); *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974) (stressing the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel"); and *Springer v. Collins*, 444 F. Supp. 1049 (D. Md. 1977).

In addition, the statutory laws of many states provide defendants with an evaluation on the issues of criminal responsibility and/or competence to stand trial.⁵ Recently,

634 P.2d 743 (Okla. Crim. App. 1981); *Richardson v. State*, 569 P.2d 1018 (Okla. Crim. App. 1977). Brief for the Petitioner, *Ake v. State*, note 17, No. 83-5424, U.S. S. Ct.

⁵ Bonnie and Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, VA. L. REV. 427 (1980).

the American Bar Association's Standing Committee on Association Standards for Criminal Justice recommended in its Draft Criminal Justice Mental Health Standards that

The accused's Sixth Amendment right to effective assistance of counsel justifies the use of a mental health or mental retardation professional consultant whenever the defense attorney honestly believes that the professional's aid could support a defense claim. For example, in virtually every homicide case, mental states are so important that the assistance of a mental health or mental retardation professional is warranted. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, FIRST TENTATIVE DRAFT CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Section 7-3.3, Commentary (July 1983) (hereafter "ABA Draft Standards").⁶

These decisions, statutes, and standards are based on the underlying conviction that mental health professionals have information and opinions about mental processes that are both relevant and helpful to the trier of fact in criminal cases. This is particularly true with regard to the increasingly important subjective elements of crime, such as *mens rea*, diminished capacity, intoxication, and insanity. See generally, Bonnie, *supra* note 5; Model Penal Code §§ 2.04, 2.08 (Proposed Official Draft, 1962). Under Oklahoma law lay witnesses can give their opinion of a defendant's sanity if they have a reasonable basis upon which to do so. However, in reality, it is so unusual for a defendant pleading insanity not to support his plea with expert testimony that even if defendant Ake had put on lay witnesses, the absence of expert testimony could itself have been highly prejudicial.

The importance of psychological evidence on subjective elements of criminal responsibility is well stated by

⁶ The draft has not been approved by the House of Delegates or Board of Governors of the ABA, and is not the official policy of the ABA.

Justice Frankfurter in his dissent in *Smith v. Baldie*, in which he would have upheld the due process right of a defendant in a capital case to a psychological evaluation by an expert of his choice, in addition to the one provided by the court.

It is not for this Court to find a want of due process in a conviction for murder sustained by the highest court of the State merely because a finding that the defendant is sane may raise gravest doubts. But it is our duty under the Fourteenth Amendment to scrutinize the procedure by which the plea of insanity failed and the defendant's life became forfeit. *A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process* in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment. (Emphasis added)

344 U.S. 561, 570-571 (1952).⁷

Because defendant Ake was required to raise a doubt about his sanity without the benefit of such relevant and probative evaluation, the risk that the jury would erroneously find Ake sane was very great. *Amici* contend it was too great to comport with due process.

Whether an indigent defendant in a capital case is automatically entitled to the appointment of a psychological expert when he requests one, without any threshold showing of relevance or necessity, is not a question before this Court. In the case at bar, when the defendant requested a psychological expert, he had already pleaded the insanity defense and had been found by state selected experts and by a state court to be mentally ill and incompetent to stand trial only a short time after the offense took place.

⁷ The majority in *Smith v. Baldie* found that where, unlike the case at hand, the court had ordered a psychological evaluation of the defendant's state of mind at the time of the offense, the defendant was not entitled to an additional evaluation. No examination or evaluation of the defendant Ake's state of mind at the time of the offense was made in this case.

The homicides occurred on October 15, 1979, and the defendant was apprehended in November. His behavior at arraignment in February 1980 was so bizarre that the court *sua sponte* appointed a psychiatrist to examine him in order to determine his competence to stand trial. Dr. William L. Allen examined the defendant on February 22 to determine his *present* competence, and, uncertain as to the proper determination, requested that the defendant be transferred to a state hospital for observation and testing. The trial judge ordered that transfer on March 5, and defendant remained hospitalized until May. On April 1, 1981, Dr. R. D. Garcia, Chief Forensic Psychiatrist at the state hospital, reported to the court that in his opinion, the defendant was incompetent to stand trial.

On April 10, 1980, the trial judge conducted a special hearing on defendant's competence. At that hearing Dr. Garcia and Dr. Allen concurred that the defendant was mentally ill, incompetent to stand trial, and dangerous. In addition, Dr. Allen testified that the defendant did not *currently* have the capacity to determine right from wrong or to appreciate the wrongfulness of his actions. Based on that testimony, the Court found defendant Ake to be mentally ill and in need of treatment and recommitted him to the state hospital. On May 22, Dr. Garcia reported that the defendant was taking 600 mg. of Thorazine each day and was competent to stand trial so long as he continued to take the medication. Criminal proceedings were reinstated on May 27, 1980.

At the pretrial conference on June 13, defendant's attorney requested that the court appoint a psychological expert (to be selected by the court) to assist him in presenting his insanity defense, or to provide the defendant with funds to obtain such assistance. The trial court reluctantly denied this request for state assistance, on the ground that such assistance was not authorized by state law. Thus, the trial court was fully informed about the need for a psychological evaluation of defendant's

state of mind at the time of his offense, the defendant's desire to obtain such an evaluation, and his financial inability to do so.

It is difficult to imagine a more compelling case for the right to a court-appointed psychological expert. The defendant had confessed to a horrible offense committed immediately after losing his girlfriend and termination of his employment. He had taken a large amount of drugs and alcohol at the time of the offense and had acted irrationally immediately after the crime in using a credit card issued in the name of the woman he had just murdered to finance his escape. Furthermore, witnesses had testified that the defendant had had a troubled childhood and a father who had physically abused him.

Most compelling of all, within six months of the crimes, when he finally received professional evaluations, the defendant was found by state psychiatrists to be suffering from a psychotic condition diagnosed as "paranoid schizophrenia" (more accurately, schizophrenic reaction, paranoid type).⁸ Furthermore, he was found incompetent to assist in his defense and was determined by at least one psychiatrist to be unable, at the time of evaluation, to determine right from wrong. Only after he had been taking Thorazine for a period of weeks was he found sufficiently competent to be tried.

This evidence certainly supports an inference that at the time of his crime the defendant may also have been psychotic and unable to understand the difference between right and wrong. In this case, the risk was very great that, without the benefit of a psychological evaluation and expert opinion concerning the defendant's state of mind when he committed the homicides, the jury would erroneously find an insane defendant criminally responsible.

⁸ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL III (3rd ed. 1980).

3. Having Created The Right To Plead Insanity, Oklahoma Must Accord Due Process And Other Constitutional Guarantees to those Seeking to Exercise that Right.

Although the Constitution has not been interpreted by this Court to prohibit criminal punishment of the insane, Oklahoma, like most other states, provides by statute that persons insane at the time of the offense will not be criminally punished. Okla. Stat. tit. 21, § 152 (1983). Having created this right, the state may not be arbitrary in the implementation of it.⁹ *Amici* contend that by refusing to provide defendant with a psychological evaluation, the state effectively denied defendant the defense of insanity solely by reason of his indigency; and that such denial in this case was arbitrary and prohibited by due process and other constitutional guarantees.

Although this point is discussed in more detail in the brief of petitioner Ake, *amici* agree that denial of expert assistance because of indigency, at least in the circumstances of this case, violates those constitutional guarantees.¹⁰

⁹ *E.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-438 (1982); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). Cf. *Boddie v. Connecticut*, 401 U.S. 378 (1971); *Hovey v. Elliott*, 167 U.S. 409 (1897). Defendant Ake's interest in life is surely as protected by due process as the property and liberty interests involved in these cases.

¹⁰ This Court has made it clear that whether required by due process, equal protection, or the Sixth Amendment guarantee of effective assistance of counsel, the essentials of a fair trial may not be denied solely because of defendant's poverty. *Strickland v. Washington*, — U.S. —, 52 U.S.L.W. 4565 (May 14, 1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1955); *Powell v. Alabama*, 287 U.S. 45 (1932).

The American Bar Association's Standing Committee on the Association Standards for Criminal Justice has recommended that:

The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to

B. The Information and Opinions Provided by Qualified Mental Health Professionals are Relevant and Useful to the Trier of Fact.

1. The Factfinder Can Profit from Expert Testimony Regarding the Nature and Severity of Claimed Psychological Dysfunction and From Informed Estimates of the Defendant's Knowledge, Perception and Motivation at a Given Time.

Experience with the application of the insanity defense and with individualized sentencing has yielded some conclusions about the appropriate role of mental health expertise in the criminal process. It is true that the term "insanity" for the purposes of criminal exculpation is a legal and moral term, not a medical one, and it must be applied by the legal trier of fact, not by a technical expert. Nevertheless, experts play an important role in the fact finding process by informing the ultimate decision-maker about psychological processes in general, and those of the accused in particular.

Mental health professionals use a multitude of tests and techniques to contribute three types of useful information to the trier of fact in criminal cases. First, trained mental health professionals can gather facts con-

the existence or grade of criminal liability relating to defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation.

ABA Draft Standards, *supra*, note 6 and accompanying text. Explaining its position the Committee stated:

The indigent defendant's need for mental health and mental retardation professional assistance are as great as those of wealthy defendants. Paragraph (a) establishes the indigent defendant's right to obtain this professional assistance at public expense. ABA Draft Standards, *supra* note 6 and accompanying text, Section 7-3.3 Commentary.

cerning the relationship between the defendant's claimed psychological dysfunction and his behavior which a lay person might not notice or regard as significant. For instance, a defendant who suffered from acute psychological aberration at the time of an offense will not necessarily display to the jury the symptoms of that aberration, *e.g.*, delusions, hallucinations, disorientation, assaultive behavior or extreme withdrawal.¹¹ Yet information about those phenomena can be obtained by a trained professional. Even if the lay person can recognize in the defendant signs of cognitive or emotional disturbance, professional training or experience often may be required to elicit more detailed information.¹²

Factual data can be gathered by mental health professionals in several ways. Professional interviews with the defendant are, of course, essential.¹³ In addition, most clinicians will try to obtain from other people and from written records additional information about the alleged offense, the subject's previous antisocial behavior, his general history, and relevant medical and psychological history. This information is used to verify information obtained from the accused on these subjects and to obtain information unknown to him.

The second kind of information the mental health professional can provide the factfinder is an explanation of the defendant's mental condition which takes into account the factual information and symptoms observed. By offering the trier of fact "clinically reasonable" possibilities and alternative explanations of the facts, the expert provides a framework within which to assemble otherwise unrelated pieces of information. These explanations put family, psychological, medical and personal history together into a coherent whole. As one commentator has noted "[i]f the clinician were not allowed

¹¹ A. GOLDSTEIN, *THE INSANITY DEFENSE* 25-26 (1967).

¹² Bonnie, *supra* note 5, at 459.

¹³ H. DAVIDSON, *FORENSIC PSYCHIATRY* 35-62 (2d ed. 1965).

to express any inferences or opinions concerning his observations, the factfinder would be left with fragments of data that may actually confuse rather than enlighten."¹⁴ Although some observers fear that juries will place too much confidence in the "scientific" nature of expert testimony and will defer too much to expert opinion, others believe that lay persons are naturally skeptical of psychiatric explanations and will weigh expert testimony carefully.¹⁵

Under the common law, expert testimony based on third party hearsay information was held to be inadmissible.¹⁶ However, there has been a trend toward relaxation of this restriction. Rule 703 of the Federal Rules of Evidence now provides that the facts or data upon which an expert bases an opinion need not be admissible "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 425 (2d ed. 1977). The admission of expert opinions based on hearsay evidence is premised on the belief that mental health professionals are aware of the biased and self-serving nature of some of the information they receive, and that they are trained to assimilate information from a wide variety of sources, to evaluate each fact, to discount some facts and emphasize others, to make their own personal observations and to come to a conclusion.¹⁷ Thus, opinion testimony offered

¹⁴ Bonnie, *supra* note 5, at 491.

¹⁵ "Because laymen do not deal with abnormal behavior on a day to day basis, their intuitions are skewed in the direction of normal behavior, and they favor commonsense explanations for departures from the norm. Mental health professionals, on the other hand, deal constantly with abnormal behavior and are trained to consider explanations that do not proceed from commonsense analysis." Bonnie, *supra* note 5, at 485.

¹⁶ 20 Am. Jur. 2d Evidence, § 866.5 (1964); Diamond & Louisell, *The Psychiatrist as an Expert Witness; Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1351-52 (1965).

¹⁷ Diamond & Louisell, *supra* note 16, at 1353.

by psychologists and psychiatrists is generally admissible under the Federal Rules of Evidence and the laws of Oklahoma.

Finally, mental health experts can present hypotheses of how the defendant's psychological dysfunction, if one is found, might have affected the specific conduct involved in his offense. Increasingly, courts and commentators agree that to exclude such professional opinions and explanations of aberrant psychological functioning would be to exclude an important source of insight and informed opinion and would both prejudice the defendant and confuse the factfinder.¹⁸ See also Federal Rule of Evidence 704.¹⁹

2. Professional Psychologists Are Qualified to Provide Forensic Psychological Evaluations and to Testify as Experts in Criminal Trials.

Amici believe that the defendant in this case was entitled to a psychological evaluation of his state of mind at the time of the offense by a qualified mental health expert, and that professional psychologists are such qualified experts. Psychologists, by virtue of their training and experience, the strict evaluation of their credentials by state licensing authorities, and their participation as independent providers of mental health services in federal, state, and private third-party reimbursement plans, are recognized as fully qualified to assess and diagnose mental disability and to testify as expert witnesses on general issues such as the reliability of psychological findings, and on the mental condition of a particular person at the present or in the past.

The minimum level of training required for recognition as an independent professional psychologist is the doctoral

¹⁸ A. GOLDSTEIN, *THE INSANITY DEFENSE* 19 (1967).

¹⁹ FED. R. EVID. 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See also, *id.*, Advisory Committee's Notes, FED. R. EVID. 403, 701, 703.

degree,²⁰ which usually requires four to five years of didactic and field placement experience, with approximately three years devoted to coursework, one year to a full time supervised internship at a clinic, hospital, or other training center, and the completion of dissertation research.²¹

To offer services, including evaluations and diagnosis, to the public for a fee as an independent practitioner, all 51 jurisdictions, including Oklahoma, Okla. Stat. tit. 59, § 1351-1375 (1979), require psychologists to be licensed or certified.²² To further ensure a high quality of professional practice, many states have adopted ethical codes identical or quite similar to the APA's *Ethical Principles of Psychologists*, 36 AM. PSYCHOL. 633 (1981). *E.g.*, Okla. Stat. tit. 59, § 1361 (1975). The Ethical Principles deal with a variety of professional and scientific issues and mandate that psychologists practice only within their areas of expertise and seek consultation when necessary.

Recognition of both psychologists and psychiatrists as independent professionals providing mental health serv-

²⁰ APA, *Standards for Providers of Psychological Services*, 32 AM. PSYCHOL. 495 (1977); Hess, *Entry Requirements for Professional Practice of Psychology*, 32 AM. PSYCHOL. 365 (1977).

²¹ The basic training model of doctoral programs in professional psychology is the scientist-professional model, *i.e.*, the teaching of the basic science and methods of psychology combined with the theory and techniques of clinical intervention. See generally, APA CRITERIA FOR ACCREDITATION OF DOCTORAL TRAINING PROGRAMS AND INTERNSHIPS (Jan. 1979).

²² LAHMAN, *LICENSURE REQUIREMENTS FOR PSYCHOLOGISTS: USA AND CANADA* (1978); Stigall, *Licensing and Certification*, in *PROFESSIONAL PSYCHOLOGIST'S HANDBOOK* (B. Sales, ed., 1983). Certification laws limit the use of the title "psychologist". Licensing laws regulate the use of the title and also define the scope of those activities for which a license is required. *E.g.*, Okla. Stat. tit. 59, § 1362 (1979). State examining boards administering laws regulating the practice of psychology also require that applicants pass an examination, either written, oral or both. *Id.* at § 1365.

ices on an equal footing is expressed not only in public attitudes but also in federal and state statutory and regulatory law and in private sector practices. See *Blue Shield v. McCready*, 457 U.S. 465 (1982); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981). Most relevant federal statutes require direct recognition of professional psychologists as independent health-care providers, i.e., as persons qualified to deliver services without mandatory referral or supervision by a physician.²³ Almost 40 states, including Oklahoma, Okla. Stat. tit. 36 §§ 2652; 6055 (1979), representing about 90% of the American population, have enacted laws establishing the direct recognition of psychological services for reimbursement purposes.²⁴

Psychologists have provided information as expert witnesses in criminal trials since at least the early 1920's,

²³ E.g., Federal Employees Compensation Act, 5 U.S.C. § 8101(2) (1976); Vocational Rehabilitation Act, 29 U.S.C. § 723(a)(1) (1976); Health Maintenance Organization Act, 42 U.S.C. § 300e-1 (1976); 42 C.F.R. §§ 110.101, 110.104 (1980); Disaster Relief Act, 42 U.S.C. § 5183 (1976); 42 C.F.R. § 38.2(e) (1980); Veterans Health Care Expansion Act, 38 U.S.C. § 613(b) (1976); Comprehensive Employment and Training Act, 29 U.S.C. §§ 801 et seq. (1976); 29 C.F.R. § 94.4(bb) (1978). Two notable examples of such programs are the Federal Employee Health Benefits Program, 5 U.S.C. § 8902(k) (1976), which covers approximately 10 million federal workers and their beneficiaries, and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), 10 U.S.C. § 1071 et seq. (1976); 32 C.F.R. § 199.12(c)(3)(iii)(a) (1981), which covers both inpatient and outpatient services for approximately 7 million dependents of military personnel, retired military personnel, and other beneficiaries.

²⁴ APA, RECOGNITION AND REIMBURSEMENT FOR PSYCHOLOGICAL SERVICES (1983). In effect, these laws allow consumers a "freedom of choice" among state licensed practitioners. The Health Insurance Association of America, which represents more than 300 insurance companies that write approximately 80 percent of all health insurance contracts issued by United States companies, formally supports the introduction of such "freedom of choice" legislation in the remaining states and has endorsed a model statute.

but it was not until 1940 that the issue of the admissibility of psychologists' testimony was formally addressed by the courts.²⁵

Psychologists who are qualified in terms of their education and experience may offer an opinion about the presence or absence of mental disorders and their causal connection with criminal or tortious conduct.²⁶ A majority of those jurisdictions that have discussed the admissibility of such testimony treat psychologists and psychiatrists equally.²⁷ The use of expert witness testimony from psychologists in criminal trials has met with almost unanimous endorsement by commentators.²⁸

²⁵ See H. MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME (1908); S. FREUD, PSYCHO-ANALYSIS AND THE ESTABLISHMENT OF THE FACTS IN LEGAL PROCEEDINGS, in 9 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 103 (std. ed. J. Strachey 1959) (originally published in 1906).

²⁶ *People v. Hawthorne*, 293 Mich. 15, 291 N.W. 205 (1940), *Hidden v. Mutual Life Insurance Co.*, 217 F.2d 818 (4th Cir. 1954), and *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) (en banc).

²⁷ See Gass, *The Psychologist as Expert Witness*, 38 MD. L. REV. 539, Appendix at 602-621 (1978). Psychological expert testimony has been explicitly accepted in Oklahoma. *Rogers v. State*, 634 P.2d 743 (Okla. Crim. App. 1981); *Carter v. State*, 376 P.2d 351 (Okla. Crim. App. 1962).

²⁸ See, *Bonnie*, supra note 5; Lassen, *The Psychologist as an Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A. J. 239 (1964); Levine, *Psychologist as Expert Witness in "Psychiatric" Questions*, 20 CLEV. ST. L. REV. 235 (1955); Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L. J. 82 (1969); Louisell, *The Psychologist in Today's Legal World*, 39 MINN. L. REV. 235 (1955); Nash, *Parameters and Distinctiveness of Psychological Testimony*, 5 PROF. PSYCHOL. 239 (1974); Pacht, Kuehn, Bassett & Nash, *The Current Status of the Psychologist as an Expert Witness*, 4 PROF. PSYCHOL. 409 (1973); Perlin, *The Legal Status of the Psychologist in the Courtroom*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26-36 (G. Cooke, ed. 1980); Rice, *The Psychologist as Expert Witness*, 16 AMER. PSYCHOL. 691 (1961); Note, *Psychologist's Diagnosis Regarding Mental Disease or Defect Admissible on Issue of Insanity*, 8 VILL. L. REV. 119 (1962); Com-

One of psychology's most important contributions to the science of psychological evaluation has been the development, administration, and interpretation of psychological tests which measure a variety of factors such as intelligence, personality, and psychopathology.²⁹ See generally EIGHTH MENTAL MEASUREMENTS YEARBOOK (O. Buros, ed. 1978). Although none of these tests should be used alone or interpreted without reference to the particular demographic attributes of the person being tested or to the setting in which the tests have been administered, in the hands of an experienced and well-trained psychologist, they are important supplements to the evaluation interview.³⁰

ment, *The Psychologist as an Expert Witness*, 15 KAN. L. REV. 88 (1966). There has been criticism that traditional expert testimony by mental health professionals concerning the prediction of dangerousness is not justified. See, e.g., Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971 (1982); Gass, *The Psychologist as Expert Witness*, 38 MD. L. REV. 539 (1979). Insofar as these critiques argue that experts should not be allowed to utter opinions that are not based on firm scientific evidence or that reveal a "doctrinaire commitment to a preconceived idea," see, *PASE v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980), amici agree.

²⁹ Assessment devices available to the professional psychologist include intelligence scales, paper-and-pencil personality tests, and projective techniques in which ambiguous stimuli are presented to the examinee to tap personality dynamics not always discernible to the lay person or to the examinee him/herself. "[T]he special assessment, testing, and intellectual/personality evaluation skills and techniques possessed by clinical psychologists uniquely prepare them for much courtroom work. . . ." Perlin, *The Legal Status of the Psychologist in the Courtroom*, in *THE ROLE OF THE FORENSIC PSYCHOLOGIST* 26 (G. Cooke, ed. 1980). Psychological tests are essentially objective and standardized measures of samples of behavior. A. ANASTASI, *PSYCHOLOGICAL TESTING* (4th ed. 1976).

³⁰ "A more objective method of assessing the degree of illness or the veracity of the patient may be through the psychological testing procedure which one cannot effectively fake throughout. Often one will require psychological testing to determine . . . underlying psychotic process. Occasionally the testing, especially the projective

The use of a comprehensive assessment of intelligence and psychopathology is especially important in jurisdictions, like Oklahoma, which use the M'Naghten test or one of its variants. Because that test weighs heavily the cognitive capacity of the defendant, reliance on expert testimony by psychologists, who are specifically trained to assess intellectual ability, may be of crucial significance to the defendant asserting the insanity defense.

C. Requiring The State to Provide Indigent Defendants a Psychological Evaluation would Not Place an Unreasonable Procedural or Financial Burden on the State.

Providing an expert mental health evaluation to indigent defendants need not be complex or expensive. Given the limited number of insanity pleas actually raised, and the fact that the great majority of states already provide indigent defendants the resources necessary to obtain expert mental health evaluations upon request,³¹ the additional burden placed upon the criminal justice system by this requirement would be minimal. This additional burden is more than outweighed by considerations of due process and equal protection.

1. The Procedure For Providing Indigent Defendants An Expert Mental Health Evaluation Need Not be Burdensome.

The procedure for providing an indigent defendant with an expert mental health evaluation of his mental condition at the time of the alleged crime could be

tests, will show a psychotic element which does not emerge on clinical examination, especially after one or two interviews. Psychological trends and patterns of personality are quite helpful in assessing an individual in forensic matters and are best determined by the testing procedure." Sadoff, *Working with the Forensic Psychologist*, in *THE ROLE OF THE FORENSIC PSYCHOLOGIST* 106, 109 (G. Cooke, ed. 1980).

³¹ Brief for the Petitioner, *Ake v. State*, No. 83-5424, U.S. S. Ct.

straightforward and efficient. As recommended by the ABA Standing Committee on Association Standards for Criminal Justice, upon belief that such an evaluation could support a substantial legal defense, counsel for the defense could move for such an evaluation at an *ex-parte* hearing. The court should grant the motion as a matter of course unless it determines that the motion has no foundation.³² Should the court determine that a mental health evaluation is appropriate, there are several possible mechanisms for providing it. The court may make funds available and permit the defendant to select an expert of his choice. Alternatively, the court could make an appointment from a list of experts in much the same way that indigents are appointed counsel in some jurisdictions. Discretion as to the mode of selection could remain with the states.

This Court has determined that it is a violation of due process to try a defendant who is incompetent. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). Pursuant to this determination, Oklahoma and other states have passed statutes permitting the defendant to move for a competency hearing.³³ Thus, where the competency of the defendant is in doubt, repetitive evaluations and hearings could be prevented by permitting counsel to move for an expert mental health evaluation of the defendant's mental condition at the time of the alleged crime when he or she moves for a competency evaluation and hearing.

2. The Cost of Providing Indigent Defendants an Expert Mental Health Evaluation Would Not Be Unduly High.

Despite its high degree of visibility, insanity is not often raised as a defense, and only some of those who plead insanity are indigent defendants. It is therefore

³² ABA, Draft Standards, *supra* note 6.

³³ See e.g., Okla. Stat. tit. 22, § 1175.2 (1979).

unlikely that requiring states to provide an expert mental health evaluation for indigents who have pleaded insanity would result in substantial numbers of such requests.³⁴ If this Court's holding were restricted to apply only to capital cases, the numbers involved would be even more limited.

Furthermore, most states already provide indigent defendants with the resources required to obtain expert mental health evaluations either by statute or by court decision.³⁵ Those jurisdictions which provide psychological evaluations to indigent defendants have not found the costs to be excessive. Thus a holding that the Constitution mandates the provision of such resources would affect only the handful of states which have not yet extended such protections to their citizens and would not constitute a significant financial burden for those states. The incremental costs to the criminal justice system of requiring these few jurisdictions to provide such protections would thus not be high.

³⁴ Innovative programs for providing expert mental health evaluations to indigent defendants can insure that the costs remain reasonable. In Virginia, for instance, the state utilizes an existing network of community mental health centers to provide such evaluations to indigent defendants. Jailed defendants are taken to the centers to be evaluated on an outpatient basis, thereby avoiding more expensive hospitalization. The mental health experts conducting such evaluations are required to have special training in forensic evaluations, usually provided by the University of Virginia Forensic Evaluation Training and Research Center. The current fee schedule provides for remuneration to the mental health centers in the sum of \$100 for competency evaluations, \$200 for retrospective evaluations of the defendant's state of mind at the time of the crime, and \$200 for a presentencing evaluation. Where the defendant has already been evaluated once at the time of the presentencing evaluation, the fee drops to \$100. Reimbursement for testimony at trial is \$50 per day, plus mileage. ANNUAL REPORT OF THE UNIVERSITY OF VIRGINIA FORENSIC EVALUATION, TRAINING AND RESEARCH CENTER, 1982.

³⁵ Brief for the petitioner *Ake v. State*, footnotes 15 and 17, No. 83-5424, U.S. S. Ct.

II. WHERE THE STATE HAS RELIED ON EXPERT PREDICTIONS OF DANGEROUSNESS TO ESTABLISH AGGRAVATING CIRCUMSTANCES SUPPORTING THE DEATH PENALTY, IT MAY NOT DENY AN INDIGENT DEFENDANT THE ASSISTANCE OF A MENTAL HEALTH PROFESSIONAL TO EFFECTIVELY CROSS-EXAMINE AND REBUT SUCH TESTIMONY.

This case poses the issue explicitly left open by this Court in *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189 (July 6, 1983)—whether “despite petitioner’s claim of indigency, the court [may refuse] to provide an expert for petitioner” to present views opposing the state’s psychiatric predictions of dangerousness admitted into evidence to support the death penalty. *Id.* at 5194. *Amici* believe that the state may not, consistent with the due process requirements announced in *Barefoot*, introduce predictions of dangerousness to justify the death penalty and then deny the indigent defendant the means of presenting opposing expert testimony. In *Barefoot* and more recently in *Strickland v. Washington*, — U.S. —, 52 U.S.L.W. 4565 (May 14, 1984), the Court relied heavily on the truth-seeking nature of the adversary process to provide criminal defendants a constitutionally guaranteed fair trial, and the Court required that that process be adhered to in sentencing hearings. In this case, the adversary process required providing the petitioner the opportunity to secure at least one opposing expert witness, so that the state’s “psychiatric testimony predicting dangerousness [could] be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored.” *Barefoot v. Estelle*, 51 U.S.L.W. 5189, 5194 (1983).

This Court has recognized that “the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” *California v. Ramos*, — U.S. —, 51 U.S.L.W. 5220, 5222 (1983). Pursu-

ant to this concern, the Court has undertaken to “provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused.” *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court has ruled that the likelihood of future dangerousness is a constitutionally acceptable criterion for imposing the death penalty. *Jurek v. Texas*, 428 U.S. 262 (1976). Finally, the Court has held that psychiatric predictions of future dangerousness are admissible in evidence, even if unreliable, but only because they are subject to cross-examination and rebuttal in the adversary process. *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189, 5194 (1983).

Those rulings have been implemented by statute in Oklahoma: “[u]pon conviction of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. . . . In the sentencing proceeding, evidence may be presented as to any of the aggravating circumstances enumerated in this act. 21 Okla. Stat. § 701.10 (1983). Among the seven aggravating circumstances listed in the statute is the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Id.* at § 701.12(7) (1983).

In *Ake*, the trial court conducted the requisite sentencing proceeding, as required by statute. At that proceeding, the prosecution put on two expert psychiatric witnesses who testified that the defendant would constitute a continuing threat to society. Counsel for the defense had previously asked the court to appoint an expert for the defendant to help prepare for cross-examination and to rebut the prosecution’s witnesses but his request was denied. At the close of the proceeding, the jury found that Ake would probably commit future criminal acts of violence, and he was sentenced to death.

Amici assert that where, as here, the state has presented expert testimony on this issue, denying an indigent defendant access to expert assistance and testimony necessary to the cross-examination and rebuttal of such witnesses is violative of his rights of due process, and effective assistance of counsel, and is so likely to produce an erroneous sentence as to be in contravention of the Eighth Amendment.

In *Barefoot*, the question presented was whether expert mental health testimony as to a defendant's future dangerousness was so unsound as to be likely to produce an erroneous sentence and therefore its admission was violative of the Eighth Amendment. Unlike contemporaneous psychological evaluations, or evaluations of an individual's past mental condition, predictions of future conduct, specifically of dangerousness, are highly unreliable.³⁶ Despite documentation of its unreliability, in-

³⁶ See e.g., Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Ewing, *Dr. Death and The Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Cases*, 8 AM. J. LAW & MED. 407 (1983); Kozol, Boucher & Garafolo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371 (1971); Steadman, & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. LAW & CRIMINOLOGY 226 (1978); Monahan, *THE PREDICTIONS OF VIOLENT BEHAVIOR; DEVELOPMENTS IN PSYCHOLOGY AND LAW, THE MASTERS LECTURE SERIES: PSYCHOLOGY AND THE LAW* 147 (Scheirer and Hammonds, ed. 1982). Despite this unreliability, however, lay people are likely to display a high degree of deference to the opinions of mental health experts. As Justice Blackmun has acknowledged, "[t]here is little question that psychiatrists are perceived by the public as having a special expertise to predict dangerousness, a perception based on psychiatrists' study of mental disease." *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189, 5202 (1983) (dissenting opinion). See also Gass, *The Psychologist as Expert Witness: Science in the Courtroom*, 38 MD. L. REV. 539, 599 (1979) (juries likely to exaggerate the significance of psychological testimony given its "aura of scientific accuracy").

cluding an *Amicus* brief filed by the American Psychiatric Association, the Court ruled that testimony predicting future dangerousness can be received in evidence. Justice White, writing for the majority, did not hold that such testimony was uniformly reliable. Rather, he expressed his conviction that the adversary system would provide the factfinder with the information necessary to weigh the testimony and reach the correct result.

We are unconvinced . . . , at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case. *Id.* at 5195.

The majority opinion emphasized that effective cross examination and rebuttal testimony were essential to the fairness of receiving the state's expert testimony regarding future dangerousness.

. . . [T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored [J]urors should not be barred from hearing the views of the State's psychiatrists along with the opposing views of the defendant's doctors" (emphasis added). *Id.* at 5194.

The majority opinion strongly implied that if the trial court had refused to provide an expert for an indigent defendant, so that there could be no "opposing views of the defendant's doctors," the Court's rationale would not support the admission of the state's expert testimony. The majority noted that there was no "contention that despite petitioner's claim of indigence, the court refused to provide an expert for petitioner," and noted that Texas

provides up to \$500 for the expense of expert witnesses. *Id.* at 5194, n. 5. In this case, however, the trial court *did* refuse the request of an indigent defendant for a mental health expert to assist him.

Amici respectfully request that the Court extend the holdings of *Jurek* and *Barefoot* to their logical conclusion by holding that where, as here, the prosecution presents expert testimony as to the defendant's future dangerousness at a capital sentencing hearing, an indigent defendant is constitutionally entitled to the expert assistance essential to the integrity of the adversary process in which the reliability of such testimony must be tested.

CONCLUSION

For the reasons stated above, the judgment of the Oklahoma Court of Criminal Appeals should be reversed and the case remanded for a new trial.

Respectfully submitted,

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June 2, 1984

* Counsel acknowledge the able assistance of Jesse G. Kreier, a student at Georgetown University Law Center, in the preparation of this brief.

No. 83-5424

Office - Supreme Court, U.S.

FILED

JUN 1 1984

ALEXANDER L. STEVAS

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

GLENN BURTON AKE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court
of Criminal Appeals of the State of Oklahoma

**MOTION FOR LEAVE TO FILE
BRIEF OF THE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION AND GEORGETOWN LEGAL
INTERNSHIP PROGRAM AS AMICI CURIAE
SUPPORTING PETITIONER**

RICHARD J. WILSON
NATIONAL LEGAL AID AND DEFENDER
ASSOCIATION
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BEST AVAILABLE COPY

828

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. 83-5425

GLEN BURTON AKE,

Petitioner

v.

STATE OF OKLAHOMA,

Respondent

MOTION FOR LEAVE TO FILE
A BRIEF AMICI CURIAE

The National Legal Aid and Defender Association and the Georgetown University Law Center Legal Internship Program respectfully move for leave to file a brief amici curiae in this case. The attorneys for the parties take no position concerning the filing of the brief.

The National Legal Aid and Defender Association (NLADA) is the sole national voice for the overwhelming majority of public defenders, private attorneys and defender clients who make up its defender membership. Representing nearly 600 member public defender offices and about 7,000 individual defenders, NLADA has

spoken out on national issues of concern to the legally indigent and their attorneys in both civil and criminal cases.

The Legal Internship Program is a graduate degree program in Trial Advocacy. Each year since 1960 ten E. Barrett Prettyman Fellows have represented indigent criminal defendants in the District of Columbia Court of Appeals, the District of Columbia Superior Court and the United States District Court and the United States Court of Appeals for the District of Columbia Circuit. Since the program's inception, Georgetown graduate fellows

have represented more than two thousand indigent clients in the District of Columbia Courts. Fellows also supervise third year law students from Georgetown University Law Center who undertake to represent indigents charged with misdemeanor offenses in the Superior Court. The third component of the fellowship -- alongside teaching and practice -- is scholarship. Fellows must complete a thesis of publishable quality in order to earn an LL.M. degree.

Amici are vitally interested in the role played by defense counsel in the administration of criminal justice. This case raises a crucial issue concerning

the representation of indigent criminal defendants. It is believed that because of the particular memberships and perspectives of our two organizations, the brief which amici curiae are seeking to file will serve to create a more complete discussion of the constitutional issue.

Respectfully submitted,

JAMES M. DOYLE

GEORGETOWN CRIMINAL
JUSTICE CLINIC
605 G Street, N.W.
Third Floor
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(202) 624-8380

(Counsel of Record)

RICHARD J. WILSON

**NATIONAL LEGAL AID AND
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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 1984, copies of this motion and of the brief amici curiae were mailed, postage prepaid, to David W. Lee, Assistant Chief, Federal Division, Office of the Attorney General of Oklahoma City, OK, 73105, counsel for respondent and to Charles S. Sims, American Civil Liberties Union, 132 West 43 Street, New York, N.Y., 10022, counsel for petitioner. I further certify that all parties required to be served have been served.

JAMES M. DOYLE

6
No. 83-5424

Office - Supreme Court, U.S.
FILED
JUN 2 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

GLEN BURTON AKE, PETITIONER

v.

STATE OF OKLAHOMA, RESPONDENT

*ON WRIT OF CERTIORARI TO THE
OKLAHOMA CIRCUIT COURT OF CRIMINAL APPEALS*

JOINT APPENDIX

DAVID W. LEE
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**PETITION FOR CERTIORARI FILED
SEPTEMBER 13, 1983
CERTIORARI GRANTED MARCH 19, 1984**

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85 pp

INDEX

	<i>Page</i>
Relevant Docket Entries from District Court for Canadian County, Oklahoma	1
Chronology of Proceedings in Oklahoma Court of Criminal Appeals	6
Letter of William L. Allen, M.D. (Feb. 26, 1980)	7
Letter of R. D. Garcia, M.D. (April 1, 1980)	10
Excerpts from Transcript of Mental Health Hearing (April 10, 1980)	11
Letter of R. D. Garcia, M.D. (May 22, 1980)	16
Excerpts from Transcript of Pre-Trial Conference (June 13, 1980)	17
Excerpts from Transcript of Trial (June 23-26, 1980) ...	22
Excerpts from Jury Instructions (June 26, 1980)	57
Jury verdicts (June 26, 1980)	60
Judgment and Sentence of District Court (July 25, 1980)	62
Opinion and Order of Oklahoma Court of Criminal Appeals (April 12, 1983)	66
Order Denying Petition for Rehearing (June 15, 1983) ..	82
Order of Supreme Court of the United States Granting Leave to Proceed <i>in forma pauperis</i> and Granting Petition for Writ of Certiorari	83

DISTRICT COURT FOR
CANADIAN COUNTY, OKLAHOMA

RELEVANT DOCKET ENTRIES

<i>Date</i>	<i>Description</i>
10-17-78	Information Filed
10-17-79	Warrant Issued (Glen Burton Ake a/k/a Jonny Vandenoever)
11-23-79	* * * This is the initial arraignment of both Defendants. Information read, advised of rights. Defendants [sic] state they are unable to hire their own attorneys. The Court at this time appoints the Public Defender to represent the Defendants. Bonds denied. * * * Each Defendant enters a plea of Not Guilty. * * *
1-15-80	Amended Information filed
1-17-80	* * * The Defendants appear for arraignment on the Amended Information. * * * The Defendants are provided with copies of the Information. Their rights are fully explained at this stage of the proceeding. The attorney for each Defendant announces that they waive the reading of the information and they enter a plea of Not Guilty. Each Defendant has indicated that he understands the nature of the charge. The Court, after hearing the matter, denies bond and the Preliminary hearing is scheduled for January 21, 1980 at 9:00 a.m. before Judge Bednar. Judge Bednar.
1-21-80	Matter comes on for Preliminary hearing this date. * * * Court finds there is probable cause to believe that the crime of Murder in the First Degree was committed on or about October 15, 1979 * * *. The Defendants are bound over to the Trial Division of the District Court. * * *
2-14-80	* * * Case comes on for arraignment in the Trial Division. * * * Upon statement of coun-

sel, Defendant elects to remain mute as to entry of plea * * * and the Court enters a plea on behalf of the Defendant of Not Guilty reserving the right to withdraw the plea for purpose of motions. Defense counsel specifically do not desire the particular plea of Not Guilty by Reason of Temporary Insanity to be entered * * *

2-20-80 It having come to the attention of the Court that in addition to the interruption at arraignment created by this Defendant, there have been other incidents of bizarre behavior at the jail and because of other information related to the Court by others, it appears that this behavior may very well be staged for the benefit of the Court, but the Court desires the assistance and advise [sic] of expert medical help. In view of the record made at arraignment by counsel for Defendant-Ake as to his present state of mind, the Court hereby Orders that Dr. William Allen see the Defendant at his jail cell on Friday, February 22, 1980 at 8:00 a.m. for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation, as provided by the statutes of the State of Oklahoma. Judge Martin.

3-5-80 Copy of letter from William L. Allan, M.D. regarding Glen Ake filed.

3-5-80 Order of committment [sic] for observation issued to Canadian County Sheriff (Glen Burton Ake)

3-5-80 The Defendant ordered transported for temporary observation of present sanity. Judge Martin.

4-7-80 Copy of letter from Eastern State Hospital filed.

[4-10-80]* [Civil Mental Health Hearing held; Court finds Ake mentally ill and in need of care and treatment]

5-1-80 Copy of letter to Judge Martin from R. D. Garcia, M.D. Chief Forensic Psychiatrist, Eastern State Hospital filed

5-27-80 * * * The Court having been notified by Eastern State Hospital at Vinita, Oklahoma, that the Defendant has recovered sufficiently, and that he is mentally competent to stand trial. The Court Orders the proceedings herein reinstated. Judge Martin.

6-2-80 It appearing to the Court that proceedings herein have been reinstated, the case is set for Pre-Trial Conference on June 13, 1980, at 1:30 p.m. and set for Trial on the Merits on June 23, 1980, at 9:00 a.m. Judge Martin.

6-13-80 * * * Defendant appears by Jim Brewer and Richard Strubhar, but not in person. Comes on for Pre-Trial conference.

* * *

Defendant's Motion for Production of Transcript of Mental Hearing is sustained. The Court Reporter is directed to prepare the transcript at State expense.

Defendant's Demand for Production of Psychiatric Evaluation is overruled upon representation of the State it has no Report of any nature.

Defendant's Motion to Have Psychiatrist Evaluate the Defendant at Court expense is overruled. The Court Orders that the Defendant be made available by the Authorities for examina-

*This proceeding was held in a separate matter, Docket No. PMH 80-8, and is not reflected in the Docket Entries of the criminal case. The transcript of this hearing was admitted into evidence at the trial. See Tr. 607-08.

tion at the Defendant's expense, in the event he is able to raise the necessary funds.

Defendant granted permission to file written Motion to Remand for Separate Jury Trial on Present Mental Competency and Motion to Have Psychiatrist Evaluate. The Defendant's motion for Separate Jury Trial on Present Sanity is argued at this time, but Defendant suggests that he will have additional matters to present in that regard just prior to Trial. This issue will be settled immediately prior to Trial.

* * *

6-26-80 The Jury, after due deliberation in the first stage of the Trial, renders the following verdict: We, the Jury, empaneled and sworn to try the issues of the above title [sic] cause, upon our oath, find the Defendant, Glen Burton Ake, Guilty of the crime of MURDER IN THE FIRST DEGREE. Court accepts the verdict, and approves the same. Judge Bednar.

6-26-80 The Jury, while deliberating in the second stage of the Trial, returns the verdict, showing with respect to the Statutory Aggravating Circumstances, as follows (1) The murder was especially heinous, atrocious, and cruel. (2) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. (3) They found existence of probability that the Defendant would commit criminal acts of violence [sic] that would constitute a continuing threat to society. The Jury, having completed that verdict form, entered its verdict of Guilty of the Murder and the Crime in the First Degree and fixed the Defendant's punishment at DEATH. The Court accepts the verdict form, the Jury is polled, each Juror individually indicates that they found the three circum-

stances to be true and that they had accessed [sic] the punishment at death. Judge Bednar.

6-26-80 The Court set the sentencing date to be July 25, 1980, at 9:00 a.m. The Defense attorneys were informed they had two weeks to file any motions which they may have from this date. The Court denies any bond. Judge Bednar.

7-25-80 Motion for New Trial filed

7-25-80 The Matter comes on for Judgment and Sentencing this date. * * * The Defendant presents a Motion for New Trial. The Motion for New Trial overruled. The Court enters its Judgment overruling the Motion for New Trial. The Court, finds there is no legal cause shown why Judgment and Sentence should not be pronounced against the Defendant. In conformity with the verdict of the Jury, the Court enters its Order sentencing the Defendant to punishment by DEATH for the offense of MURDER IN THE FIRST DEGREE in conformity with the verdict of the Jury. The Date of Death to be October 10, 1980. Judge Bednar.

7-25-80 The Court this day issues the Death Warrant of the Defendant, as per Warrant. Judge Bednar.

7-25-80 Notice of Appeal filed

7-25-80 Order Appointing Appellate Public Defender filed and recorded.

COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

CHRONOLOGY OF PROCEEDINGS

<i>Date</i>	<i>Proceedings</i>
2-2-81	Petition in Error filed.
6-2-82	Oral argument held.
4-12-83	Opinion and Judgment filed. Convictions and sentences affirmed.
5-2-83	Petition for Rehearing filed.
6-15-83	Petition for Rehearing denied.

LETTER OF WILLIAM L. ALLAN, M.D.
(FEBRUARY 26, 1980)
[FILED IN THE DISTRICT COURT]
[SEE DOCKET ENTRY OF MARCH 5, 1980]

William L. Allan, M.D.
5317 N.W. 114th
Oklahoma City, Oklahoma 73132

February 26, 1980

Judge Martin
Canadian County Court
El Reno, Oklahoma

Dear Judge Martin,

I saw Glen Ake in psychiatric evaluation in order to determine his competency to stand trial.

In my judgment it is not possible to determine on the basis of one or two interviews whether Mr. Ake is indeed competent to stand trial. He did act in a bizarre fashion but it is not clear to me whether this represents a true psychotic picture or whether he is acting in order to convince others of his psychosis. It should be possible to determine this issue with a more prolonged sixty day observation period.

Mr. Ake is a danger and it is important that such sixty day psychiatric observation be done in a setting with sufficient security to control him.

With best wishes.

Very Truly Yours

/s/ William L. Allan, M.D.

WILLIAM L. ALLAN, M.D.

WLA:OF

Incl: Psychiatric Evaluation

PSYCHIATRIC EVALUATION

AKE, Mr. Glen Burton

Date: February 22, 1980

D.O.B.: September 8, 1955

Glen is a large extremely muscular white male who presents himself in an odd fashion. He initially refused to speak with me, stared in an angry manner, but gradually would talk about himself in relation to his study of the Bible. There are no apparent speech defects. The predominant affect or mood was that of anger and at times he would flare into marked anger. The man is obsessed now with the Bible and is studying it intensively. He has, however, little formal academic skills and is somewhat limited in his interpretation of the Bible. At times he appears to be frankly delusional about selected passages of the Old Testament. He claims to be the "sword of vengeance" of the Lord and that he will sit at the left hand of God in heaven (Jesus sits on the right hand). During this discussion of the Bible, at times he would lapse into obscenities.

On the issues pertinent to his competency to stand trial, Mr. Ake is apparently delusional. It should be stressed that it is not clear from this clinical interview whether he is indeed psychotic about this or if he is malingering. Mr. Ake said that there was no need to pray for forgiveness. He acknowledged that he had been in Court and stated that Judge Martin is an agent of the Devil and hence had no authority over him. He stated that everyone connected with the Court and jail are sinners. In contrast, however, he nodded in acknowledgment as to the charges of murder in the first degree and he stated that his lawyers, Mr. Brewer and Mr. Strumbaer, are his friends, and that they are Christians. He stated at one point that he would cooperate with them and on the second occasion he stated that he would not talk to them. At that point he appeared to be extremely angry with the examiner about this line of questions.

Mr Ake spoke a great deal about the barrenness of this land and of the upcoming cleansing of fire by God. He associated to his difficulties with his family. He stated that his

mother and, more so, his father would be punished for their sins. He acknowledged that there is a nephew who is too young to sin and hence will not be punished. Mr. Ake stated that he had first spoken directly to Jesus at seven years of age after his father had hit him severely for smoking his first cigarette.

Diagnostic Impression: (1) Probable paranoid schizophrenia. (2) Conscious malingering or play acting of this material cannot be ruled out during brief psychiatric evaluation at this time.

This is one case in which a more prolonged psychiatric evaluation is necessary in order to determine the man's competency to stand trial, understanding of the charges against him, and ability to cooperate with counsel.

/s/ William L. Allan, M.D.

WILLIAM L. ALLAN, M.D.

LETTER OF R. D. GARCIA, M.D.
(APRIL 1, 1980)
[FILED IN THE DISTRICT COURT]
[DEFENDANT'S EXHIBIT 1; ADMITTED
INTO EVIDENCE, TR. 608]

EASTERN STATE HOSPITAL
VINITA, OKLAHOMA
74301

1 April 1980

Re: AKE, Glen Burton #32391
Your Case Nos. CRF 70-302, 303, 304 & 305

Dear Judge Martin:

The above-named was admitted to this hospital by your order for a period of observation not to exceed April 10, 1980, on March 6, 1980. Criminal charges are pending.

We have completed our evaluation of Mr. Ake and it is the opinion of our staff that he does not have sufficient ability to consult with an attorney and he does not have a rational or actual understanding of the proceedings pending against him. Since Canadian County is not in our catchment area we would recommend that court action be taken to have him committed to Central State Hospital at Norman, Oklahoma for care and treatment.

Please remove him from this hospital at your earliest convenience.

Respectfully,

/s/ R. D. Garcia, M.D.

R. D. GARCIA, M.D.
Chief Forensic Psychiatrist

RDG:ml

cc: District Attorney, Canadian County, ElReno, Oklahoma
County Sheriff, Canadian County, ElReno, Oklahoma

IN THE DISTRICT COURT IN AND FOR
CANADIAN COUNTY, STATE OF OKLAHOMA

EXCERPTS FROM TRANSCRIPT OF
MENTAL HEALTH HEARING
(APRIL 10, 1980)

[ADMITTED INTO EVIDENCE AT TRIAL, TR. 607-08]

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

GLEN BURTON AKE, A/K/A JOHNNY VANDENOVER,
DEFENDANT

PMH. No. 80-8

CRF-79-302

CRF-79-303

CRF-79-304

CRF-79-305

IN RE: THE MENTAL HEALTH OF
GLEN BURTON AKE, a/k/a JOHNNY VANDENOVER
APRIL 10, 1980
BEFORE THE HONORABLE JUDGE FLOYD MARTIN

* * *

[TESTIMONY OF WILLIAM L. ALLEN, M.D.]

[p. 17] Q. [by the Court] Doctor, based upon your total contact with Mr. Ake, based upon all of your examination of the records available to you, and based upon your discussion with Dr. Garcia, do you have an opinion as to Mr. Ake's present mental competency?

A. Yes

Q. Would you please tell me what your opinion is?

A. I believe that he is a psychotic—uh—that his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis that he is dangerous.

* * *

[p. 18] Q. The statute requires, Doctor, that we explore the least appropriate restrictive treatment for his condition. Do you have an opinion about that?

A. Yes, I—I think that, because of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—within the State Psychiatric Hospital System.

* * *

[p. 19] Q. [by Judge Martin] Doctor, the question has been posed, and it is an appropriate one for us to explore, although it is not the exact burden here, but do you have an opinion based on everything available to you as to whether or not Mr. Ake at this time would have the ability to communicate with his attorneys and assist them in any defense or any criminal felony matters that are pending?

A. I have—uh—less certainty as to the answer to the competency or evidence for competency to stand trial. As you know I saw him for that particular purpose in February, and at that time, asked him questions directly concerning that; that he know what the charges were against [p. 20] him and could he cooperate with counsel.

I was not sure at that time so I referred him for inpatient observation and that evidence has been offered by Dr. Garcia, saying essentially, that he was not competent to stand trial. Now, today, in referring to his attorney, Mr. Brewer, he said that he too—that Mr. Brewer too—I believe, was an agent of the devil, whereas, previously he said—previously, Mr. Ake had said Mr. Brewer was a Christian and, hence, his friend, and able to represent him.

But, I think that what the psychiatrists can say in a more general way is that Mr. Ake is extremely delusional, uncooperative, and so, just without addressing questions to him directly on that issue, the general impression would be that he's not able to cooperate.

Q. All right.

A. But, I did not, in the limited examination that we could do here—I certainly did not address that issue.

Q. I notice that the report of at least one person here seems to indicate that Mr. Ake was not responsive to questioning here this morning?

A. That's right.

Q. Can you tell me a little bit about your experience in that regard during your examination before the Court came into the Courtroom.

What was your impression about his responsiveness [p. 21] or lack thereof?

A. Well, he was extremely unresponsive, did not wish to answer question[s], and, in fact, did not answer many questions, so that I, in turn after conferring with the attorney, didn't ask him some of the routine questions about family, etcetera, that are on the commitment form.

Mr. Ake's justification for not answering is to quote scripture and say, essentially, that he doesn't have to, that we are not of the same dimension—I believe "lofty dimension", that he is, and therefore, we cannot understand him—him and his truth. So, it was extremely difficult to do the usual sort of clinical psychiatric essentially because he wouldn't answer and he appeared to be quite angry when we did ask him questions.

Q. All right. Doctor, I don't know whether you have an opinion on this—but, do you have an opinion as to whether or not Mr. Ake at this time understands the significance or the difference between right and wrong?

A. At this time?

Q. At this time?

A. (Mumbles) I have to give a qualified opinion because—uh—all of his statements are coached [sic] in terms of his religious beliefs which are delusional and his concept of right and wrong does not accept the Court's authority of government.

[p. 22]

Q. I see.

A. So, he just doesn't accept what the rest of us live by.

Q. So, I'm having to interpret a little ...

A. Sure.

Q. (Continuing) ... but do I interpret your answer to say that in terms of society's judgment as between right and

wrong, whatever things he may have are not on that level but are somewhat different?

A. Yes. His word [sic] would be a different dimension. He does not, as I understand it accept the ordinary rules of right and wrong.

THE COURT: Mr. Goerke, do you think that sufficiently covers it?

MR. GOERKE: Yes, sir.

THE COURT: Thank you.

You may step down, Doctor. Thank you very much.

* * *

[p. 28] THE COURT: Mr. Ake, I have not tried to address you before. I wanted to hear the evidence from others.

Can you hear me from where you are seated and you need not move up here?

MR. AKE: Huh?

THE COURT: Can you hear me, Mr. Ake?

MR. AKE: Yeah.

THE COURT: All right. I wondered if you have any comment that you would care to make about these proceedings that have gone on or if you have talked to the lawyers at all about what you would like to have done at this time?

MR. AKE: No. You're the head of them.

THE COURT: All right.

Are you aware that you have refused to answer some questions that Mr. Lewis and Mr. Brewer asked you earlier this morning?

MR. AKE: I won't answer nobody's questions. They're all the same

THE COURT: All right.

The doctors indicated to me that you have refused to talk with them also. Are you aware that you have refused to talk with them?

[p. 25]

MR. AKE: Everybody's the same.

THE COURT: I see. All right.

MR. AKE: All right.

It is the finding and order of this Court that Glen Buron Ake is a mentally ill person in need of care and treatment as defined in Title 34A O.S. § 3 of the laws of Oklahoma.

The Court has prepared now and will now execute an order of admission * * *.

LETTER OF R. D. GARCIA, M.D.
(MAY 22, 1980)
[DEFENDANT'S EXHIBIT 2; ADMITTED
INTO EVIDENCE, TR. 608]

EASTERN STATE HOSPITAL
VINITA, OKLAHOMA
74301

22 May '80

The Honorable Floyd L. Martin
Judge of the District Court
In and For Canadian County
ElReno, Oklahoma 73036

Re: AKE, Glenn Burton #32391
Your Case No. PMH 80-8

Dear Judge Martn:

The above-named was admitted to this hospital by your order for care and treatment on April 10, 180. Criminal charges are pending against him.

As a result of a recent evaluation it is the opinion of our staff that Me. Ake has improved to where he would be able to adequately consult with an attorney and he does have a rational as well as actual understanding of the proceedings pending against him. He is being maintained on the following medication: Thorazine 200 mgms. t.i.d. We would of course recommend that he continue this medication in order for his condition to remain stabilized.

We would further recommend that he be returned to the jurisdiction of your court and we would appreciate your removing him from this hospital at your earliest convenience.

Respectfully,

/s/ R. D. Garcia, MD

R. D. GARCIA, M.D.
Chief Forensic Psychiatrist

RDG:ml

cc: District Attorney, Canadian County, ElReno, Oklahoma
County Sheriff, Canadian County, ElReno, Oklahoma

IN THE DISTRICT COURT FOR
CANADIAN COUNTY, OKLAHOMA
EXCERPTS FROM TRANSCRIPT OF
PRE-TRIAL CONFERENCE
(JUNE 13, 1980)
[CAPTION OMITTED IN PRINTING]

[p. 19] THE COURT: * * * I am curious about something else that you haven't mentioned. If you intend to have a psychiatrist evaluate your client and you are court-appointed counsel . . .

MR. BREWER: [Counsel for defendant] That comes next, judge.

THE COURT: (Continued) . . . how—all right. How do you intend to pay for it?

MR. BREWER: That was phase two.

THE COURT: All right.

MR. BREWER: At this time, judge, in relationship to our motion, now—I'm sure the court is very well aware of the severity of the charge—the court appointed, and by statute, we are granted certain funds by law that if the court sees necessary or fit and proper, the court can award us money to prepare a proper defense. And, at this time I am going to ask the court to grant us a reasonable amount of funds in which to pay the psychiatrist with, due to the fact, one, that the court has already seen fit to incarcerate, or to send him for a mental evaluation, giving right to the court that there was a problem. And, at this point, defense counsel feels that Glen Ake, indigent, and the court appointed counsel; still, under the constitution is entitled to monies for a psychiatrist as if he were another Cullin Davis who had the money to pay for it. To deny . . .

THE COURT: Show me any statutory or case authority [p. 20] that the court even has the power to pay for it, much less any right, under . . .

MR. BREWER: Okay, sir. Under Title—excuse me, judge, I have got a lot of material here.

(The court complied.)

MR. JAMES: [Assistant District Attorney] Your Honor, while everybody's kind of looking here, I'm familiar—of course I didn't know the motion was going to be

here today— but I am familiar with some recent case law that says that they are not entitled to have additional doctors appointed, and, in truth, you have appointed a doctor to examine him. You appointed the doctor at Vinita to examine him. He is a professional person. He treated him as an independent source.

THE COURT: Yes. Well, Mr. Brewer argued that there was statutory provision for that, and I was not aware of it. I thought perhaps I could learn something.

MR. BREWER: Under Title 21 ...

THE COURT: Under 21?

MR. BREWER: (Continued) ... O.S. Supplement, 1978, 701.14 ...

THE COURT: 701.14.

MR. BREWER: (Continued) ... which goes to the appointment of counsel and compensation; if my memory serves me right, there is a paragraph in there or words that I can be afforded an attorney's fee and a reasonable amount for expenses.

(WHEREUPON, a discussion ensued off the record.)

[p. 21]

MR. BREWER: Judge, may I make one other statement at this point?

THE COURT: Go ahead.

MR. BREWER: It may solve a lot of problems. Mr. Strubhar and I are both in agreement that the court appointed a very qualified M.D., Dr. William L. Allen and the court—at the time when Dr. Allen was one of the doctors that declared him to be incompetent—the court could then instruct Dr. Allen to go back and review Glen Ake at this time. That would be sufficient for us.

(WHEREUPON, a discussion ensued off the record.)

THE COURT: Let me hand you the statute book that I have received from my library now and see if you can find what you had in mind.

MR. BREWER: I figured that—if the court please, I remember seeing it, judge—if the court please, I will have to, during this very short period of time—I told the court I will furnish the court with that, but it says; that, if I re-

member correctly, the courts said where a man is declared indigent and is appointed legal counsel, at that point in time—if the court please, is *prima facie*—the man does not have any money because he was appointed legal counsel. Thus, in order to properly give him the defense necessary, then when the court appointed legal counsel, the thing that stems from that would be a meager amount of funds to prepare for the case, other than [p. 22] just a meager attorneys' fee. The State has an unlimited budget and things of this nature.

THE COURT: Oh, my, thank you. Go ahead.

(The parties laughed.)

THE COURT: Exclamation point.

THE REPORTER: I got that.

MR. BREWER: In Florida numerous employees, plus very good friends of the Police Department and other agents that get things done that does not cost money for defendants, indigent defendants in jeopardy of losing their life, come before our judicial system. The court appoints a legal counsel and then, having declared him indigent, then the court, by their own declaring of indigency and appointing of legal counsel, has inferred meager funds for preparation because the judge couldn't possibly conceive that defense attorneys could just be appointed and coldly walk into a case and defend a Murder One without some kind of meager money or meager means and investigating monies.

To deny to this client the indigent, individual, funds for the preparations would be a miscarriage of justice, to even appoint even an attorney, if the court please, because an attorney has got to have, as the court knows, funds to properly defend his client. And, in a Murder One case, I hear the word "expense", and I cannot possibly believe that in anybody's heart a few meager dollars is going to stand between [p. 23] a man charged with Murder in the First Degree, of insuring him of a constitutional, fair and impartial trial, and being prepared because of a few dollars that they think might be spent of the taxpayers' money. Life, itself, is far too precious to consider any monetary value that might be expended within reason, and that is where the un-

derlying factor of expenses come when they appoint an attorney. It is automatically assumed that you will get some money ...

THE COURT: Mr. Brewer, let me interrupt your statement a moment.

MR. BREWER: (Continued) ... I have no more to say, judge. I will write you a little brief or something.

THE COURT: Do we agree that the statute you cited, at least by number, does not appear to grant that authority, as I read it?

MR. BREWER: Yes, sir, I will agree with that.

THE COURT: All right.

MR. BREWER: But, I will just inform the court that it is in my mind. I read the statute and operated under it five times. There is someplace where I am entitled to expenses because I remember getting expenses in a case for ...

THE COURT: All right.

MR. BREWER: (Continued) ... \$16.50 for xerox copies I made and Judge Homer Smith signed the order and I haven't cited it to you, but I will find that case or whatever he used [p. 24] and bring it back to the court for your evaluation.

THE COURT: Let me state, before ruling upon your motion, I am not aware of any statutory authority in this case. I am aware of U.S. Supreme Court case in *U.S. Ex Rel. Smith v. Baldy*; 334 U.S. 561, 97 Law Ed. 549: 73 Sup. Ct. 391, in which the U.S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants. Oklahoma has cited that U.S. Supreme Court case in two decisions, of which I am aware. In *Stedham v. State* at 507 P 2d. § 1310, and *Tims v. State* at 515 P 2d. § 1227, in both *Stedhams* and *Tims*, our Court of Criminal Appeals denied that right to defense counsel.

The further problem in regard to it is that the statutes and all of the rulings are, originally, very strict, and since then have become almost crippling restrictive, that courts may not— repeat, “not”—spend any court funds unless specifically authorized by statute. This has been more and more strictly construed against courts, and so unless I can

see some specific authority, I could not even consider it. The request for private psychiatric evaluation at the expense of the State is denied. You may have the defendant available, if you are able to arrange it, in some other manner.

IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY
STATE OF OKLAHOMA
[EXCERPTS FROM TRANSCRIPT OF TRIAL
(JUNE 23-26, 1980)]

THE STATE OF OKLAHOMA, PLAINTIFF-IN-ERROR [sic],
vs.

GLEN BURTON AKE, A/K/A JOHNNY VANDENOVER, AND
STEVEN KEITH HATCH, A/K/A STEVE LISENBEE,
DEFENDANTS-IN-ERROR [sic].

No's. CRF-79-302
CRF-79-303
CRF-79-304
CRF-79-305

* * * * *

TRANSCRIPT OF PROCEEDINGS ON APPEAL [sic]
HAD FROM JUNE 23 THROUGH JUNE 26, 1980
BEFORE THE HONORABLE JAMES D. BEDNAR

* * * * *

APPEARANCES:

MR. EARL GOERKE, District Attorney; and MR. BILL JAMES, Assistant District Attorney, appearing on behalf of the State of Oklahoma.

MR. J. MALONE BREWER, Attorney at Law, Suite 214, 2000 Classen Boulevard, Oklahoma City, Oklahoma 73106, appearing on behalf of the Defendant Glen Burton Ake.

MR. RICHARD D. STRUBHAR, Attorney at Law, 403 West Vandament, Yukon, Oklahoma 73099, appearing on behalf of the Defendant Glen Burton Ake.

* * *

[PROCEEDINGS IN CHAMBERS]

[p. 3]

MR. BREWER: We are going to at this time withdraw our Motion for Sanity Trial to Determine Present Sanity on and for the following reasons: One, that he has just re-

turned from Vinita. The State's doctors have certified him competent to stand trial. We still raise the issue of sanity at the time the crime was committed, and the possibility of his sanity becoming rational and unrational from time-to-time, which we will inform the Court as this progresses. But, we feel as far as time, and as far as the time element involved we feel that at this time the testimony would primarily be that he was certified incompetent to stand trial by independent private practitioners. Sent to Vinita, and while at Vinita certified that he now was competent to stand trial. We do not at this [p. 4] time waive any rights as to his mental competency at the time the crime was committed.

THE COURT: So, the Motion for Jury Trial on Present Sanity is hereby withdrawn, is that correct?

MR. BREWER: Yes. Is that agreeable with you, Mr. Strubhar?

MR. STRUBHAR: Yes

(Court is recessed.)

* * *

[p. 411]

[STIPULATION READ BY THE COURT]:

That if Larry Fallon were called to testify, he would testify that he is a jailer at the Moffat County Jail, Craig, Colorado. That on November 21, 1979, at approximately 1136 hours, upon booking Glen Burton Ake in jail, he discovered one Visa card, number 4646-933-431-849. The account number expiring December 1979, belonging to one Marilyn S. Douglass. That it was found in the right rear pocket of Glen Burton Ake. That the said Larry Fallon would testify that on November 21, 1979, at approximately 1136 hours, he turned said card over to James E. Curtis, Detective, for the Moffat County Sheriff's Office.

* * *

[p. 456]

[TESTIMONY OF VIRGINIA KEEFE]

A Steven, and Glen, and I. And, on the third day, he had taken his wife to work—the friend had, and while he was gone they had taken the pendant. And, then they had

told me about some jewelry that they had, and they gave me some to wear. And, they said that it belonged to some people in Oklahoma that they had killed.

Q Who said that?

A Glen did.

Q Did they, in fact, show you some jewelry?

A Yes, sir, they let me wear some of it.

* * *

[p. 457]

Q All right. Prior to leaving the house, were there any telephone calls made?

A Yes, sir, Glen called his sister, and she had said that two of the—the two kids had lived, and Glen was scared.

Q How do you—

A They just wanted to—

Q How do you know that that's what the sister said?

[p. 458]

A Glen told us—Steve and I.

* * *

[p. 466]

[PROCEEDINGS IN CHAMBERS]

MR. GOERKE: * * * We are not going to have any defense of [p. 467] temporary insanity, because there is not going to be any evidence of it at the time. We just as well discuss that now too.

MR. JAMES: Yes, sir.

MR. GOERKE: No evidence of it.

THE COURT: You are going to have a doctor testify, or we are not going to do it on letters, I hope?

MR. BREWER: No, no, no, no.

THE COURT: Well, I cannot find—there is a reason for that—

MR. BREWER: We are going to have doctors to cover every—every doctor that has evaluated Glen Ake will testify.

THE COURT: Okay. Now, they will be ready to go in the morning, is that correct?

MR. STRUBHAR: Well, we are going to attempt to line them up.

THE COURT: Okay. We will be ready to go.

MR. STRUBHAR: One doctor is out of—he is in Arkansas, but he is supposedly coming in tonight.

MR. BREWER: Who is that?

MR. JAMES: Enos?

MR. STRUBHAR: Yeah.

MR. GOERKE: Well, they are going to be prepared to testify that they have examined, and that they have an opinion as to his mental capacity at the time the crime was committed, [p. 468] is that what you are saying?

MR. BREWER: That they can express—they didn't examine him at that time.

MR. GOERKE: They are going to now—between now and the morning?

MR. BREWER: No, they didn't examine him at the time of the crime.

MR. GOERKE: No one does. They evaluate them—

MR. BREWER: That's right. The theory of paranoid schizophrenia is a long lasting type situation. If some three months after, and due to the nature of the crime, and things that have occurred in the case, the psychiatrist can tell whether or not, in his professional opinion, he feels like at the time of the crime he was a paranoid schizophrenic, and knew the difference between right and wrong.

MR. GOERKE: I question that, but I see what you are doing.

MR. BREWER: I question it too, but nonetheless—

MR. GOERKE: No, I question even that they would base their opinion on that. I think they would have to have an MPI, and a tree/person/house, and a number of tests—physiological tests, psychological tests, psychiatric tests.

MR. BREWER: He was sent down to Norman, for testing, by the State. And, they sent him down there and they say that he is incompetent, and turn right back around and—

[p. 469]

MR. GOERKE: But, they, are not saying he didn't know right from wrong at the time of the crime, is what I am talking about now. There is a distinction.

MR. BREWER: Oh, sure.

MR. GOERKE: He could be paranoid schizophrenic and still know right from wrong.

MR. BREWER: Now, Judge, here is a question which I want the record to reflect, that Glen Ake has not spoken to me, or to Mr. Strubhar at any time during this trial. That the letter of April 1st, says that he is incompetent to stand trial. A letter of May 22nd, states that he is being maintained on the following medication: 200 milligrams TID, with the Court's recommend he continue this medication in order for his condition to remain stable. Now, at that point in time, he has a mental dysfunction that they control by the use of the tranquilizers. And, there are being questions that arise that while he takes this tranquilizer, he becomes a zombie. And, at this point he is totally and completely incoherent, should I say, and unable to—or, unable, or unwilling, or just flat can't communicate, or does not have the desire to communicate with either defense counsel.

* * *

[p. 502]

THE COURT: All right. Let's—are we ready to go to he jury?

MR. BREWER: Well, I just got my coffee, Judge. We have got one other thing to talk about.

MR. JAMES: I think there is a question—are you all raising any objection to the Jackson vs. Deno hearing?

MR. STRUBHAR: What is that?

MR. JAMES: To determine the other—

[p. 503]

MR. BREWER: I've never done a mental hearing in my life.

MR. JAMES: Nothing to do with mental.

THE COURT: In camera hearing.

MR. BREWER: Jackson vs. Deno, is that it is time that you are entitled to an in camera hearing to determine the

voluntariness, and whether or not Miranda was given, and Miranda was followed, and Miranda was properly waived.

MR. JAMES: Whether or not we would present evidence to show that he was advised of his rights.

MR. BREWER: I think we ought to.

THE COURT: Okay. Get your witnesses.

MR. JAMES: Do you want to do it with your defendant here?

MR. BREWER: We waive presence of our—he ain't going to talk to us anyway. He doesn't know what is going on. He is goofier than hell. We don't need him, and he can't assist us. We have already told the Court that he doesn't possess the ability to aid and assist in a jury trial. Has he ever talked to you, Mr. Strubhar?

MR. STRUBHAR: No.

MR. BREWER: He has never even talked to me. Never said hello.

* * *

[p. 506]

[TESTIMONY OF LUANN RAMMING (IN CHAMBERS)]

Q Did you have an occasion to have a conversation with him at approximately those hours?

A Yes, I did.

Q What was that conversation?

A He asked me if I would call the Sheriff and the OSBI for him.

Q Did you do that?

A Yes, I did.

Q Did you have a conversation with them?

A I called Sheriff Stedman.

Q As a result of the conversation with Sheriff Stedman, did you have further conversation with Glen Burton Ake?

A Yes, Sheriff Stedman asked me to go back upstairs and ask Mr. Ake if he wanted to make a complaint, or if he wanted to talk about what they had talked about the previous night. I went back up and asked him.

Q You went back up and asked Mr. Ake?

A Yes.

Q And, what did Mr. Ake say?

A He said it was what they talked about the previous night. He had some things he wanted to get off his chest.

* * *

[p. 511]

[TESTIMONY OF D.L. STEDMAN (IN CHAMBERS)]

Q Okay. What was he like at that time?

A I saw nothing wrong with him.

Q Okay. Was he—

[p. 512]

A He was coherent, and knew what was going on, and wanted to talk to us.

Q Okay.

A In fact, he told us that he had some stuff on his mind he wanted to get off his chest.

* * *

[p. 516]

Q How did you take this statement? Was it—did you take it on a tape, and then it was transcribed, and gone back and he read it, and signed it, is that correct?

A Yes, Sir. If you will notice looking at the statement, there are several places there where he corrected it, and initialed each correction that he made, and then signed it in front of a notary. This was done on the 26th day of November.

* * *

[p. 523]

[TESTIMONY OF GREG SHIELDS]

Q How did Mr. Ake act at that time?

A Competent.

Q Was he aware of where he was?

A Yes, he was.

Q Was he able to communicate with you?

A He was able to communicate clearly.

Q How was his action and demeanor?

A At that time he was very calm. As I said, he communicated well, willing to talk with us.

Q Did he know what was going on around him?

A Yes, he did.

Q Did he know why he was being held in custody?

A Yes, sir, he did.

Q Did you subsequent to advising him of his rights, ask him whether or not—did he understand his rights?

A Yes, he did.

* * *

[p. 524]

Q Okay. Approximately how long did it take to take that statement?

A Approximately two hours.

Q This is on the 23rd of November, is that correct?

A Yes, sir, Friday, the 23rd.

Q Subsequent to that time, was that statement reduced to writing?

A Yes, it was.

Q Did he sign that statement?

A Yes, he did. Also, initialed changes in the statement.

Q When did this take place?

A The statement was typed the following Monday. He would have initialed them Monday, the 26th.

Q Were you present when he signed and initialed it?

A Yes, I was.

* * *

[p. 528]

Q Okay. Now, during the course of this statement, did Mr. Ake ever act in a unrational manner?

A No, he did not.

Q Did he ever act incoherent?

A No, sir.

Q Did he ever make any wishes, or things during the statement that seemed highly unusual for a human being to be wishing?

A No, he did not.

* * *

[p. 536]

[TESTIMONY OF D.L. STEDMAN]

Q At the time of taking that statement from him, how did he appear? What was his demeanor and actions?

A I saw nothing unusual about his demeanor, or actions. He seemed responsive and alert to me.

Q Was he coherent?

A Yes, sir, he was.

Q Did he understand, in your opinion, where he was?

A Surprisingly so, considering what we knew about the case already, he told us things that were very parallel to them.

* * *

[p. 546]

A This is a copy of the statement—that portion of the statement which relates to the Douglass homicide, that was taken in my office on November the 23rd—the statement of Glen Burton Ake.

Q Was this his free and voluntary statement?

A Yes, sir, it was.

Q Was this statement signed?

A Yes, sir it was.

Q When was it signed?

A It was signed on November the 26th—

Q Do you know where?

A —1979. In my office.

Q Who was present?

A Myself, Greg Shields, Glen Burton Ake, and Carol Nichols.

Q At the signing of this statement, or confession, did Mr. Ake make any statement?

[p. 547]

A At the signing?

Q Yes, sir.

A Yes, sir.

Q What did he say?

A He was relating to a portion of the statement, when he made the statement, that he would like to get this all over with by Christmas.

Q Okay. Did he go over the statement?

A Yes, sir, he did.

Q Did he read the statement before he signed it again?

A Yes, sir, he did, and initialed changes that he made while he was reading the statment.

Q Did he change some things?

A Yes, sir he did.

Q What type of things did he change?

A Typographical errors that he caught.

Q He was able to catch some typographical errors?

A Yes, Sir.

Q Okay. Go ahead, sir.

A One of the aliases that he told us that he used was changed from one sentence to another. He felt that it was better in the next sentence than it was in the previous sentence. There was a—as I recall, I would have to go through and find it, there was a town misspelled. The town LaHoma was misspelled by, (Spelling) H-O-L-M-A, and he changed that to (Spelling) [p. 548] L-A-H-O-M-A.

Q He was able to read—this statement was how many pages?

A Forty-four.

Q He read it completely at that time?

A Yes, sir.

Q He was able to make changes through there, such as this?

A Yes, sir.

Q He seemed aware of what was going on then?

A Very much so.

Q And, he did sign it, is that correct?

A Yes, sir.

Q What name did he sign with?

A He signed his full name, Glen Burton Ake.

Q Was this notarized?

A Yes, sir, it was.

* * *

[p. 553]

[OPENING STATEMENT FOR THE DEFENSE]

MR. BREWER: Ladies and gentlemen, at this time it is phase two of the trial, which is the—you might say defense, or second part, which is called the defense case in chief. At this time it is our responsibility to call witnesses on behalf of the defendant.

At this point in time I will tell you exactly what the witnesses are and who they will be. We have three psychiatrists, Dr. Allan, Dr. Enos, and Dr. Garcia who is the mental health director—Dr. Garcia, of Eastern State Hospital, in Vinita, who works for the State of Oklahoma.

Now, what we intend to do is to put the doctors on. Dr. Allan was contacted by the Court—Judge Martin, on the Court's own feeling to contact and bring a psychiatrist in to discuss the mental condition of our client Glen Burton Ake. And, the doctor did so. And, he will relate to you just exactly what his psychiatric findings were at that period of time when he interviewed Glen Ake.

Second, of a sanity hearing with Dr. Allan and Dr. Garcia, and they are going to tell you of their interviews with Glen [p. 554] Ake, and their medical findings of the defendant at that period of time. And, subsequently he was committed to Eastern State Hospital, and was examined by the staff down there. Dr. Garcia being the head of that, is going to come forth and is going to testify to you as to his medical findings during his period of incarceration at the Vinita Mental Health Hospital.

And, that ladies and gentlemen, is the primary crux of the entire situation that we are trying to show you. The mental condition, which is a pertinent part of any trial of this defendant. Solely to your benefit. Solely for your evaluation, and solely to help you decide this case.

And, with that we will start—go ahead and put our witnesses on so you can get—consider it. Thank you very much.

THE COURT: All right. Do you want to call your first witness?

MR. BREWER: Call Dr. Allan.

THE COURT: Dr. Allan. Stand here and raise your right hand.

(Witness is sworn.)

DR. WILLIAM ALLAN,

called as a witness for the Defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION**QUESTIONS BY MR. BREWER:**

Q Would you state your name for the Court and jury, [p. 555] please sir?

A Dr. William Allan.

Q And, Dr. Allan, how are you so employed, sir?

A I'm in the private practice of psychiatry.

* * *

[p. 556]

Q Thank you, doctor. Now, doctor, have you ever had an occasion to come in contact with an individual known by the name of Glen Burton Ake?

A Yes, I have.

Q And, where did this contact take place?

A I saw him in the jail—I believe it is the City Jail here, on February 22nd, of this year. And, then I later saw him in the courtroom, on April 10th.

* * *

[p. 557]

Q Would you relate to the ladies and gentlemen of the jury, the findings during that evaluation, please?

A I saw him in his cell for approximately one hour, and at the conclusion of that, I thought that he was probably a paranoid schizophrenic. The reason I was asked to see him, was to determine—to provide evidence for the Court to determine if he were competent to stand trial. That is, did he have a mental defect, and did he also not understand the charges, and couldn't cooperate with counsel. My conclusion to that—what evidence I could say about that was, that I wasn't sure, and therefore recommended that he—recommend to the Court that he be sent to a State Hospital for 60 days observation.

Q Have you reviewed reports from the doctors at Central State—or, at East Central State Hospital—or, excuse me, Eastern State Hospital, Dr. Garcia, relating to Mr. Ake's mental condition?

A Yes, I talked with Dr. Garcia at the time of the sanity hearing, April 10th. I talked with him by phone, primarily.

Q And, did that reinforce any of your findings, or feelings at the time you interviewed Mr. Ake?

A You mean, my previous—Yes.

Q All right. Now, doctor, during your evaluation of Mr. Ake, would you relate to us some of the things that came out that caused you to feel that there was a possibility that Mr. Ake was a paranoid schizophrenic?

[p. 558]

A Yeah, he was a very difficult person to interview, chiefly because he wouldn't talk very much, and stared, and became angry and furious with me. He was obsessed, he wouldn't talk about much else voluntarily, except the Bible. He was studying that intensively. He doesn't have that much formal book learning. And, I was able to talk to him about the Bible, and then tried to get him back to talking about himself. In that he showed some very unusual religious ideas. And, in my opinion would be delusional. One example is that he is, I think, literally the sword of vengeance. and, I forget the verse in the Bible that he showed me to verify that. And, then he sat—or, he stood on the left-hand side of God, Jesus on the right. Jesus is love, and he is vengeance. So, he talked to me about those things, I think, in a very odd way. He also talked about could he cooperate—did he know the nature of the charges against him, could he cooperate with counsel? He nodded to me that he—when I repeated the charges to him, that—I was trying to get him to make statements. You know, to say, in a careful way. So, I thought that he was nodding assent. He said that he would cooperate with Mr. Strubhar, and Mr. Brewer, because they were Christians. This is in contrast to his belief about the Court—Judge Martin, and everybody in court and jail as being sinners. Later when I tried to get him to say "would he cooperate with the coun-

sel", he became furious at me. And, at that time said he wouldn't. So, he is contradictory on that.

[p. 559]

Q Let me ask you this, doctor. Were you able to ascertain when the beginning symptoms of paranoid schizophrenic started? Are you able to go back in time when you talked with him, to a particular time in his life when you say this mental situation was started, please, sir?

A Well, I'm not sure about that. This is the interview in the jail we are talking to, and there he did tell me that he talked with Jesus directly, and I'm not sure if Jesus talked with him.. I don't remember that. But, he talked with Jesus at 7 years of age, after his dad had beaten him, I think, pretty badly for smoking.

Q Now, were you able to find out, in his pattern of growing up, any childhood situations that would tend to create this condition that he now has—say, run away from home, or something of this sort, or mistreatment of some kind?

A Yeah, he has stated that he has been abused by his father. In that interview he said that—he was talking about how vengeance is necessary. And, without making a conscious connection, his next statements were about his parents, and that they were sinners, and they would be punished, and the nephew wouldn't be. He was too young to be sinful. That's in the interview. Remember, that's the jail interview. Now, there was also a sanity court hearing.

Q And, when was that held?

A That was on April 10th.

[p. 560]

Q Would you relate to us your findings—did you then, on April 10th, did you then have an opportunity to talk with and see the defendant Glen Burton Ake again on that day?

A Yes, in the court.

Q Okay. Would you relate to us again what you found, and what your findings were at that period of time, please, sir?

A At that time I thought I could state more definitely that he had a mental illness, both from seeing him directly,

and also getting the reports from Dr. Garcia. In terms of the history, the mother in the court—closed court, gave—answered questions, gave a history of him, and essentially said that he had a—from her viewpoint, a normal childhood. That as a teenager he had been a discipline problem, had been rebellious and had been a runaway.

Q All right. Now, doctor, on your findings, your discussion with other doctors in the area of psychiatry, people that have interviewed Mr. Ake, did you have any medical opinion on the mental condition of Glen Burton Ake?

A Well, I certainly do as to, you know, February 22nd and April 10th, that he was mentally ill at those times. I also have seen a report from Dr. Garcia that says he is still mentally ill, but that's not my direct knowledge.

Q Can a man be controlled, doctor, on medications? Mental problems be controlled with medication?

A Yes, they can certainly be controlled.

[p. 561]

Q Now, if you are under control on medication, does that indicate that you are medically cured, or do you still—

A That's a hard question to answer. Not necessarily that you are cured, but some people with schizophrenia essentially are cured.

Q Doctor, what is Tri-thorazine?

A Thorazine is one thing, are you—

Q Okay. Thorazine, right. This word right here (indicating).

A Yeah, Thorazine is a standard major tranquilizer, or an antipsychotic drug. It is of a group called Phenothiazines. It think it is, (spelling) P-H-E-N-A-T-H-I-A-Z-I-N-E.

Q What does that do, stabilize the condition, or something of that order?

A Yes.

Q And failure to take that medicine thus will revert back to—

A Very often failure to take the medicine causes people to become mentally ill again, yes.

Q Okay. Now, doctor, in your professional opinion, and your evaluation, would you classify Glen Burton Ake is a mentally ill person?

A At the times I saw him, yes, sir.

Q Thank you, sir.

* * *

[CROSS EXAMINATION]

[p. 563]

Q * * * And, the term "insanity" actually is not a psychiatric term. It is a medical term, isn't it?

A At one point it was. It is a legal term essentially.

Q It is a legal term, yes, sir. And, what you were visiting with about with Mr. Brewer were medical terms, were they not—mental illness?

A Yes, I saw him for two—on two occasion, for really two separate legal purposes. First was to get evidence to present to the Court as to his competency to stand trial. So, I have to ask questions that bear on the legal question on that. Secondly then, after the court had found him not competent to stand trial, they had a civil hearing. And, I was asked to speak to the civil commitment requirements—"Did he have a mental illness?", and "Was he dangerous?" And, I spoke to those two. Now, we are still on a third legal question, as I understand it.

Q What was your conclusion as to whether he is dangerous?

A That he was very dangerous.

Q Doctor, your test at the time of your interview—or, at the jail, again at the time of the sanity hearing in February, or April, was your test to ascertain whether he knew right from wrong?

A No, it was not.

Q It was whether he had a mental illness, is that correct?

[p. 564]

A Yeah, I spelled out, I think, very specifically. In the first time was "Did he have a mental illness?", and two, "Did he understand the charges against him?", and "Could he cooperate with counsel?" And, then on the second time, "Did he have a mental illness?", and "Was he dangerous?"

And, in neither case did I specifically go into detail, try to get answers as to his ability to know right from wrong at the time of the alleged act.

Q So, that was not your concern, is that correct?

A That's right.

* * *

[p. 566]

Q One further question. And, do I understand from your testimony, sir—or, let me ask you, as a result of our findings in April 1980, you are not attempting to determine whether the defendant was mentally sane—the legal term, in October, or November of 1979, are you sir?

A That's right.

* * *

[REDIRECT EXAMINATION]

Q Doctor, with—in light of your interviews and consultation with Mr. Ake, did you state that the possibility of this illness that he has been suffering from could possibly date back to age 7?

A Yes, sir.

Q Is that a possibility?

A That's a possibility.

Q So, if that possibility—hypothetically, was correct, then on the days in question, this illness could also still be apparent then too, is that not correct?

A That's another possibility.

* * *

[p. 569]

RECROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q These periods that you made this conclusion, or at least based upon the information that you have, would not relate to his status as being—knowing right from wrong back in October or November of 1979. You are not prepared to have an opinion as to that, are you?

A I have stated I do not have an opinion, medical—you know, to a medical certainty about that.

Q Right. In addition to which, even on those occasions in February and April, you are not prepared to say even then whether he knew right from wrong, but simply that he had a mental illness, is that correct, sir?

A I think so, overall. Now, one of the questions—

MR. GOERKE: That's fine. Thank you sir.

REDIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q Would you go ahead and finish what you are saying, doctor?

A Okay. Now, in asking him about, "Did he understand the nature of the charges against him?", he would nod, "Yes." He really didn't accept the authority of any earthly, court, or government, or person. So, if that speaks to his knowledge of right and wrong as of February 22nd, I don't have a firm approval, but I think you should know that. That he did not [p. 570] accept Judge Martin, or anybody's authority at that time.

* * *

MR. GOERKE: May we approach the bench?

MR. BREWER: (Out of the hearing of the jury) At this [p. 571] time I need to talk to him just a second before I put him on.

MR. GOERKE: (Out of the hearing of the jury) If it please the Court, comes now the State, we move this witness' testimony be stricken, and jury admonished to disregard it, because—The State would move that this witness' testimony be stricken from the record and jury admonished to disregard it, no relevancy established. He has no opinion as to the time of the crime, nor the time of the statement. We kept stressing October, November—he has no opinion as to his mental status at that time, as far as the legal term "insanity", which is the true question.

THE COURT: (Out of the hearing of the jury) All right. That motion will be overruled.

* * *

[p. 572]

DR. JACK P. ENOS,

called as a witness for the defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION**QUESTIONS BY MR. BREWER:**

Q State your name for the Court and jury, please?

A Jack P. Enos, M.D.

Q Now, doctor, what is your profession?

A General Practice of Medicine.

Q All right. Now, doctor, do you do any work in psychiatry

A Some. I have some interest in it.

Q Would you relate to us your background in medicine and psychiatry for us, please.

A I practiced in Yukon for 29 years. The last ten years I have been taking an ongoing course in psychiatry for general medicine.

[p. 573]

Q Have you ever served on any sanity board, or anything for the county, and things of this nature?

A Yes, sir.

Q Doctor, call your attention to April 10th, 1980, did you have an opportunity to come in contact with an individual by the name of Glen Burton Ake?

A Yes, I did.

Q And, what was the relationship of that contact, please?

A The sanity commission had been impanelled, two doctors and a lawyer. I happened to be one of the two doctors.

Q Now, doctor, at that time at the sanity hearing, did you have an opportunity to view and talk with Glen Ake?

A I had an opportunity, yes.

Q And, tell us something about that conversation, and things that occurred at the sanity hearing, please, sir?

A Well, it was essentially onesided, very little input on the part of Mr. Ake. Some that he did not feel inclined, or

necessary to talk to us, since he talked on a different plane than we talked on.

Q Did he mention talking to God, and things of this nature?

A Briefly, that was the only person whom he really communicated.

Q Did you have an opportunity to review any medical documents, any reports prior to this hearing?

[p. 574]

A Yes, we had Dr. Garcia's report, and we had Dr. Allan's report from a previous examination in the jail here.

Q Now, combined with your own interview with the defendant Glen Ake, and review of these medical reports, at the sanity hearing did you come up with a medical opinion as to the competency, or the mental state of Glen Ake?

A Yes, uh-huh, we felt and so stated that he was mentally ill.

Q Mentally ill?

A Right.

Q Okay, sir. Now, have you reviewed any reports from Dr. Garcia regarding Glen Ake, and medication that—known as Thorazine?

A I have.

Q Now, doctor, you are aware that Glen Ake is taking 200 milligrams of Thorazine—if you gave it to me right now, what would occur?

MR. GOERKE: If it please the Court, I don't [p. 575] believe this is really the proper form of a hypothetical question, if that's what he is attempting to ask.

MR. BREWER: I'll rearrange it.

Q (By Mr. Brewer:) Take a considered normal individual, give him 200 milligrams of Thorazine, and what are the reactions going to be?

A Most people will become extremely drowsy.

Q And, what about 200 milligrams, three times a day, what would that do to him?

A I think they become three times as drowsy.

Q Would it put them asleep, or put them to a point that they are—

A This is my opinion of the average person.

Q Do you have any medical opinion of the mental condition of Glen Ake?

A Yes, I do.

Q How would you classify Glen Ake at this time, to the best of your knowledge and medical beliefs?

A To the best of my knowledge and belief, I think this man is paranoid schizophrenic.

Q You consider him to be mentally ill?

A I certainly do.

MR. BREWER: No further question.

THE COURT: Mr. Goerke, cross examination?

[p. 576]

CROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q Dr. Enos, that was your opinion on April 10th, 1980?

A It was.

Q And, it is your opinion today?

A Yes, sir.

Q All right, sir. If I might ask, how long did you observe him on April 10th?

A Well, I would estimate the whole hearing consumed not more than thirty minutes.

Q How many times have you consulted him prior to that, or observed him?

A Never.

Q How many times since then?

A Never.

Q You reached your opinion though—and, what is the mental disorder, the exact mental disorder that you pinpointed that is recognized by DSM?

A The one I gave, I think would come nearest fitting the category, schizophrenia, chronic paranoid type.

Q This is the same book that says "mental illness" is worrying about your job, or worrying about your marriage?

A Right. It starts out that way.

Q What were the pivotal facts giving rise to that diagnosis on April 10th?

[p. 577]

A Mainly the reports available to me by a trained psychiatrist, as well as—

Q Actually, you say "reports". Those were just letters, were they not? Were they Dr. Allan's—

A I wouldn't argue this, right. Written publications, written documents.

Q Right, a letter recommending that he be committed for observation, that he couldn't reach any conclusion. Wasn't that Dr. Allan's "report"?

A Probably. I wouldn't argue the point. He certainly said he couldn't make some statements.

Q Right. Did you have the advantage of some psychological tests? Let me ask you, did you have the advantage of an MMPI?

A I did not.

Q Did you have the advantage of a House/Tree/Person test?

A No.

Q Thematic Apperception Test?

A No, sir. I am familiar with all of these, but none—

Q Porteus Maze Test?

A No.

Q Bender-Gestalt Test?

A No.

Q Wechsler Adult Intelligence Test?

A No.

[p. 578]

Q Graham-Kandall Test?

A No.

Q Shipley-Hartford Test?

MR. BREWER: We will object Judge. He has already testified he didn't give him any tests, if the Court please.

THE COURT: Yeah, I'll—I think—was your testimony you gave no tests?

THE WITNESS: Correct.

Q (By Mr. Goerke:) No psychological tests?

A No, no psychological tests.

Q Did you give any—let me ask you, was your diagnosis functional or organic?

A I really couldn't state that with a certainty.

Q Well, those are the two—

A Yeah, I really think it is organic, and I probably should elaborate.

Q All right, sir.

A That the medicine—

Q Let me ask you, did you have a benefit of any physiological tests, such as an x-ray, or electroencephalogram, pneumoencephalogram?

A No.

Q Neurological exam?

A Not unless they were included in Dr. Garcia's report. I don't remember whether a neurological may or may not have [p. 579] been included.

Q But, you didn't rely on that?

A No, I wasn't expected to show anything.

Q So, you didn't have the benefit of any psychological tests, nor any physiological tests to reach your conclusion?

A I hate to say none.

Q Did you have the benefit of a clinical interview?

A We had the opportunity—

Q Did you conduct one?

A We had the opportunity.

Q Did you conduct a clinical—

A Did I ask him questions? Yes.

Q During that thirty minute observation period?

A Right.

Q Did you have any benefit of, or any awareness of any previous mental or medical history?

A Had testimony from his mother, and others.

Q But, nothing documented?

A By word of mouth.

Q Did you consult with any of these former co-workers?

A No.

Q Friends?

A No.

Q Police officers?

A I don't believe any officers testified at the time. [p. 580] I do not remember if they did.

Q Did you read any police reports with regard to these charges?

A No, I did not.

Q Consult any witnesses?

A No, I did not.

Q So, you are really basing your opinion on a thirty minute period?

A Plus the reports that were available to me, yes.

Q Sir, plus what?

A Plus the reports which were available to me at that time, from reputable people.

Q Those were really letters now, weren't they?

A All right, letters.

Q I think they might be in evidence. Would you like to—would you agree, or would you like to look at them?

A I see no need to look at them. I agree they are letters, if that's the question.

Q And, as to Dr. Dr. Allan's, I believe was just a recommendation that he be committed for a 60 day period so he could be observed, wasn't that it? It was impossible to—

A Yes, in the brief period of time, correct, that he had observed him.

Q And, certainly what you are talking about—let me say first, or ask you if you will concede that insanity is a [p. 581] legal term, and not a medical term?

A I think insanity is in the hazy, or in between, neither lawyers and doctors are sure.

Q You think insanity is a medical term?

A I really don't know. I really don't know. I'm sure there is a legal definition of it. I'm sure there is a medical definition.

Q Let me ask you, is insanity—appear any place in DSM-1, 2, or 3?

A Not "insanity".

Q No, sir.

A Right.

Q But, those—the DSM's contain mental illnesses?

A Absolutely.

Q Then mental illnesses are medical terms?

A I might say, the various forms of insanity, if you wish.

Q Insanity, per se, is a legal term.

A Okay.

Q Then your examinations, or your conclusions are not whether he knew right from wrong?

A No.

Q And, certainly wouldn't relate to the months of October—

A Not at all.

[p. 582]

Q —or November 1979, as to whether he knew right from wrong?

A That's correct.

* * *

[p. 584]

Q Is there any place, in any report you have ever seen, or anything you have had the benefit to review, that has said "this defendant was legally insane in October or November of 1979"?

A No, sir.

Q Do you have any opinion as to whether—

A No, sir.

[p. 585]

MR. GOERKE: Thank you, sir.

REDIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q Doctor, in light of what you know, and all of the reports that you have read, then if you received a report—you know, where you said that he possesses paranoid schizophrenia, and he should be examined, and stuff like that in your report; you get a report back that says that he is under 200 milligrams of Thorazine, three times a day, would that still support your earlier findings that the man was mentally sick?

A I think it would.

Q Pardon me, sir?

A I think it would.

MR. BREWER: Thank you. No further questions.

RECROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q Would that tend to change your opinion as to whether he was legally insane in October or November 1979?

A No, it would not.

MR. GOERKE: Thank you sir.

* * *

[p. 586]

DR. R.D. GARCIA,

called as a witness for the Defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q How are you, doctor? Would you state your name for the Court and jury, please?

A My name is R.D. Garcia, M.D.

Q Dr. Garcia, how are you employed?

A I'm employed at the Eastern State Hospital, at Vinita, Oklahoma, as a psychiatrist.

Q All right. Now, that is a State Hospital, is that not correct?

A Yes, sir.

* * *

[p. 588]

Q Now, let me call your attention to an individual by the name of Glen Burton Ake. Have you had an opportunity to evaluate and to medically check Glen Burton Ake as—

A Yes, sir.

Q And, where did this transpire?

A This transpired at the Eastern State Hospital, Vinita.

Q For a period covering how many days?

A During the first court ordered admission, that took place March 6th, 1980 to April 6th, 1980, and then he was sent back there for psychiatric care and treatment on April 10th, four days later, 1980, for two months, until June 9, 1980.

* * *

[p. 589]

Q Okay. Now, doctor, according to the 1st day of April, 1980, in your medical opinion, you state in this letter that Glen Ake is mentally ill, is that correct, sir?

A Yes, sir.

Q Okay. Now, for the ladies and gentlemen of the jury, would you please go through your treatment with Glen Ake, and please explain to us the testing, the facts that you considered in determining his mental capacity, and things of this nature, if you would, please, doctor?

[p. 590]

A Yes, sir. First of all we have to have all the various kinds of testing, in order to eliminate physical or organic illness, in the form of laboratory tests consisting of complete blood count, urinalysis, chest x-rays, skull x-ray, EEG, and also during the time of undertaking all these examinations and psychological examinations performed by our psychologist. And, during this period of observation, we observed him day and night, pertaining to his mood, behavior, and mental capacity. And, from the very beginning we obviously detected some symptoms and signs of mental illness, consisting of suspiciousness, hallucinations, hearing voices, hearing things, believing himself to be a blue angel. And, on the other hand too, he reported to us about the use and abuse of various drugs that are mostly of the hallucinogenic variety. And, also of the excessive intake of alcohol. So, at first we thought it may be a toxic condition brought about, or associated with a drug that he had taken. We had a question about he may be acting out, or malingering. And, a thorough psychological testing revealed that the malingering spell is not there. It is a true sign of mental illness, because of the various sensitive testing, and in the psychological testing. and, also my clinical evaluation, we had ruled out the malingering spell. So, therefore, after we completed all of these examinations, being seen by the treatment team and medical staff, which I am presiding on that, composed of various doctors, psychologists, social worker, nurse, we decided that he needs [p. 591] psychiat-

ric care and treatment. So, when he came back I immediately started him on tranquilizing medication. This treatment consisted of this Thorazine, which is a tranquilizer, which when taken in high dose, for a normal individual may produce high sedation and hypnotic effect. Not only the calming tranquilizing effect, but in order to eliminate the symptoms of psychosis of mental illness. But, for—the therapeutic dose consists of a high dose of Thorazine, up until we maintain a maintenance dose of 200 milligrams, three times a day, that he must continue. This is done in order to prevent a relapse of mental condition. Our diagnostic impression beginning was that of psychosis associated with drug, and on poison intoxication with alcoholism, and a variety of dependence on drugs which are unspecified, and unspecific. The other diagnose that we had was that of a schizophrenia, paranoid type. And, he showed signs of delusions—paranoid delusion, hallucinations, and so forth, and so on. Within a month following treatment he was showing mental progress. The fortunate thing about it, he never did show any violent, combative, assault, or destructive tendency then. And, he was not cooperative in the beginning, refusing the medication perhaps, and then later on he continued to take it. And, when he—especially when he is improved halfway, he realized that he needs the medication, and he had continued to take it. No incident, or anything that we have to do for him, with regards to his so-called potentially violent or dangerous behavior. Then [p. 591] we sent him back to the court declaring him competent to face trial, and that took place when he left Eastern State Hospital on June 9th, of this year.

Q All right. Now, doctor, medically speaking, would you still classify Glen Ake as mentally ill?

Q He still would be classified mentally ill, but in remission. In other words, in terms of the symptoms with medication as a follow-up. What I mean to say, if we tried to discontinue his current medication that he is taking now, he might become overtly ill again.

Q All right. Now, you will have to—I'm in kind of an awkward position, you might kind of guide me a little bit. An individual who is paranoid psychotic—okay? That is

taking hallucinogenic drugs, consuming a large quantity of alcohol—okay? Given the combination, would the reaction that you say in your evaluation of Glen Burton Ake, at that point in time, and under those conditions, would an individual be able to distinguish right from wrong?

A If that's true, I would consider him unable to do so.

Q Unable to know, or to—

A The basic difference between right or wrong—the legal way.

Q He wouldn't know—

A But, not necessarily considering him legally insane, in a way like knowing right from wrong, because a mentally ill [p. 593] individual, they still know some basic difference between right and wrong.

Q But, under that situation then, through the consumption of alcohol, hallucinogenic drugs, and paranoid schizophrenia, there is a possibility that it would render a person unable to distinguish right from wrong, am I saying that correctly?

A That's correct, sir.

Q All right, sir.

A Absolutely.

Q So, given a hypothetical situation, on a given date, at a given time, a paranoid schizophrenic drinks a lot of alcohol, and takes hallucinogenic drugs, he could then commit an act that he does not know, or is not responsible for, is that not correct, sir?

A It is a possibility.

Q All right. Now, doctor, so I can understand, the jury can understand, what tests—I don't have a list of all those names. There is a whole bunch of tests you give people, you know, when you do them. Did you give him a bunch of tests, and things of this order?

A Quite a bit of testing with regard to his emotional condition, family life, history of mental illness, treatment in the past, tests whether he was basically just a plain antisocial, or malingering individual—hardly not. These tests were all undertaken. In the IQ test, in the beginning he failed to score [p. 594] a normal level of IQ, because of the

severe disorganized thinking process, that he was not able to follow through the questions and answers. One, I had the impression that he may be a mild mentally retarded individual through the test, but then these were all invalidated because of the severity of the illness at this time. And, later testing indicated that he had a normal/dull, or dull/average intellectual performance.

Q Now, at that point in time, with all your testing, you totally and completely, if I understand it, eliminated the fact that Mr. Ake was malingering, or was trying to fool you, is that correct?

A Yes, sir, later on.

Q He was not acting?

A In my personal opinion, he was not acting at the time.

Q As an MD and psychiatrist?

A After completing all the examinations that we had gathered.

Q Okay. While you were interviewing him, working with him, tell the ladies and gentlemen some of the thinking process, or some of the weird things that you came in contact with, that you thought were unusual?

A The first place, he mentioned about he did not remember much of the incidents, and persistently telling that he belongs to the blue angel—, he talks to God, and a lot of religious erratic type behavior and thinking. And, that is [p. 595] what brought about the fact that he may be just malingering, but then he persistently told us about—and, if he would be pushed farther, he would become hostile and a little restless, and then he would refuse to talk—that was from the beginning. But, later on he continued to say that his experience came off and on already for the last one year. And, we even questioned the fact why he did not seek any psychiatric help at that time. To him, those experiences were realistic. He thought he was even some kind of a special assignment from God Almighty, that he is one of the angels. And, not considering his religious background that he had before, it was such an exaggerated type of thinking. And, also his emotional upkeep was that of a withdrawn individual. That he did not socialize, or talk to anybody, preferred to stay in his room. And, while being

observed in his room, he just stared into space, and at times moving his lips and nothing that we could understand what he was talking about. That went on, and on, and on until the time that he came back when we started treatment—the medication that we have given.

Q All right. Now, doctor, I don't—I have—it might appear awkward, bear with me, but Glen Ake is a paranoid schizophrenic, being treated with Thorazine, 200 milligrams, three times a day, to maintain some stability, is that not correct?

A Yes, sir.

[p. 594]

Q But, he is not cured from being mentally ill, is he?

A No, sir.

Q Quits taking the medicine and there is a possibility he will revert back to the same type of delusions of—on a special assignment from the Lord as the blue angel, is that correct?

A that's correct.

Q Could reappear, all right. Now, doctor, had you been hired and paid money by the defense to come here and testify?

A No, sir.

Q And, you don't work for the defense, do you, sir?

A No, sir.

MR. BREWER: No further questions. Thank you very much, doctor.

THE WITNESS: You're welcome.

THE COURT: Cross examination?

CROSS EXAMINATION

QUESTIONS BY MR. JAMES:

Q Dr. Garcia, when did you first receive Glen Burton Ake?

A We received Mr. Ake March 6, 1980.

Q For what purpose did you receive him?

A For the purpose of psychiatric determination, or observation and testing, in order to determine whether he was insane, or not.

Q Incompetent to aid in his defense?

A Yes, sir.

[p. 597]

Q Okay. Not legally insane as knowing right from wrong, but just incompetent to aid in his defense, is that correct?

A Yes, sir.

Q Was there any call at that time for a diagnosis as to October or November 1979?

Were you looking into that?

A No, sir. We were unable to assess him during that—those months.

* * *

[p. 602]

Q Have you done any testing, or evaluation of Glen Burton Ake as towards legal insanity at the time of the commission of the offense?

A No, sir, we were not able to.

Q Do you have any opinion as to Glen Burton Ake's mental insanity at the time of the offense—October or November?

A No, I would not say. I have a personal opinion.

Q Do you have no opinion then that you can—professional opinion? You have done no testing?

A Professionally, no, sir.

* * *

[p. 604]

Q Doctor, did you do any tests to determine whether the person that is seated here, Glen Burton Ake, was mentally insane at the time of this incident?

A No, sir, we were not able to.

Q Okay. You have no opinion—

A Make any examination.

Q And, you have no opinion as to that, is that true?

A No, sir.

* * *

[REDIRECT EXAMINATION]

[p. 606]

Q Now, here is the question—a hypothetical situation. Take an oil field worker, a hard worker, a paranoid schizophrenic, on drugs, hallucinogenics, alcohol, gets involved in a violent crime. Is there a possibility that that man at that point in time, under those conditions, could not distinguish the difference between right and wrong, on a special assignment from God?

A Sure, that's a possibility.

MR. BREWER No further questions.

THE COURT: Any more gentlemen?

MR. JAMES: Yes, Your Honor.

RECROSS EXAMINATION**QUESTIONS BY MR. JAMES:**

A But, doctor, there is a difference between knowing right from wrong, and mental illness, is that correct?

A Yes, sir.

Q And, do you have any opinion as to whether Glen Burton Ake knew right from wrong in October and November of '79?

A No, sir, I don't have any opinion.

* * *

[p. 607]

MR. GOERKE: (Out of the hearing of the jury) At this point the State would move that this witness' testimony be stricken from the record, and jury admonished to disregard it, as it is not relevant to this trial.

THE COURT: (Out of the hearing of the jury) Okay. I'll overrule that.

* * *

[p. 608]

MR. BREWER: (Out of the hearing of the jury) Comes now defense counsel and informs the Court that due to the uncooperative nature of the defendant, and the lack of communication between defense counsel, defense counsel at this time is unable to put the defendant on the witness

stand, or to determine whether or not he in fact wants to execute his Constitutional right to testify in his behalf. And, based upon that, we are going to have to rest. We cannot get a yes or no if he wants to take a stand, so we rest.

MR. GOERKE: (Out of the hearing of the jury) Based upon that only? Based upon that only, you rest?

MR. BREWER: (Out of the hearing of the jury) Yes, sir.

* * *

[p. 672]

[CLOSING ARGUMENT FOR THE PROSECUTION]

You know, before we start talking about the only defense that counsel argues, that of insanity, I think we should stop and just reconsider the definitions that we received from the [p. 673] psychiatrists yesterday, from the Judge in his Instructions today. Do you remember my persistence in asking, for instance, Dr. Allan, "Do you have an opinion as to whether he knew right from wrong at the time—during October and November of 1979?"

* * *

[p. 675]

So, bearing in mind we are looking at a test of knowing right from wrong on October 15, 1979, or November when the statement was made, realizing the consequences of those acts, is there a probable—a reasonable doubt created? None of the doctors had any opinion. Remember? Each one was distinctly asked, "Do you have an opinion as to whether the defendant knew right from wrong in October and November, 1979?" None of them did.

* * *

[p. 679]

And, bearing in mind, no psychiatrist has testified here during this trial, has ever had an opinion as to whether he knew right from wrong at the time of the crime—even at the time he was committed, and came back, where he sits there today.

Mr. Brewer says, "That won't happen. They won't just turn him loose." The Judge has taken care of that in Instruction 12A—read that. Send him to a mental institution—well, we [p. 680] have been there. They sent him April 10th. They sent him back June 9th, and said he is still mentally ill, but he is ready to go back. He is sedated. If we hadn't had these charges pending, he would have gone out on the street a free man.

MR. BREWER: I'll object to that, if the Court please.

THE COURT: Overruled.

MR. GOERKE: If the charges hadn't been pending on June 9th, he would have gone back out on the street.

IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY, OKLAHOMA

EXCERPTS FROM JURY INSTRUCTIONS
JUNE 26, 1980
[CAPTION OMITTED IN PRINTING]

No: 10

You are instructed that an insane person is not responsible criminally for his acts committed when such mental condition existed. The test of criminal responsibility for acts, which would ordinarily be criminal under the law, is:

The mental ability or capacity to distinguish between right and wrong as applied to the particular act, and to understand the nature and probable consequences of such act, that is to say, the capacity to know right from wrong, and to know then that the particular act, alleged to have been committed, was wrong.

No: 12

The defendant as a part of his defense contends, in effect, that if he did in fact commit the crimes charged in the Informations, then he was in a state of insanity at the time.

In this connection you are instructed that under the laws of this State an act done by a person temporarily or partially deprived beyond a reasonable doubt, before the jury would be justified in convicting the defendant.

You are therefore instructed that if, after considering all the evidence in this case, you believe beyond a reasonable doubt that the defendant committed the acts charged in the Informations and that at that time the defendant knew the nature and consequences of his acts and knew that they were wrong, and was able to distinguish between right and wrong as applied to said acts, then in that event you would not be justified in acquitting him by reason of insanity.

On the other hand, if, after considering all of the evidence in the cases, you entertain a reasonable doubt as to whether the defendant was mentally competent to understand the nature and consequences of his acts, to distinguish between right and wrong as applied to said acts, and

to know that they were wrong, then in that event it is your duty to resolve that doubt in the defendant's favor and acquit him on the ground of insanity, and state that fact in your verdicts.

No: 12A

You are further instructed that if the defendant is acquitted on the grounds that he was insane at the time of the commission of the crimes charged and if the Court has reasonable grounds to believe that the defendant is presently mentally ill and that the of reason, upon proof that at the time of committing the act charged against him such person was incapable of knowing its wrongfulness, cannot be punished as a public offense.

The law presumes every person to be sane and able to distinguish right from wrong as applied to any particular act and to understand the nature and consequences of such act, until a reasonable doubt of his sanity is raised by competent evidence. It is an essential ingredient of a crime that a person, to be guilty of such crime, must have at the time of its commission sufficient mental capacity and reason to enable him to distinguish between right and wrong as applied to the particular act that he is then about to do. It is essential, further, that such person know and understand the nature and consequences of his act and that he know that if he does commit such act he will do wrong and subject himself to punishment.

You are further instructed in this regard that when the plea of insanity is interposed, the burden of proof is on the defendant to introduce sufficient evidence to raise in the minds of the jury a reasonable doubt of the defendant's sanity at the time of the commission of the acts in question. It is not required that the defendant shall prove such insanity to the satisfaction of the jury beyond a reasonable doubt. It is sufficient if he only introduces sufficient evidence to raise in the minds of the jury a reasonable doubt of his sanity at the time of the acts, and when this is done the burden of proof is on the State to prove the sanity of the defendant by competent evidence, release of the defendant would be dangerous to the public peace or safety, in that event the Dis-

trict Attorney shall forthwith prepare, sign and file a petition for the commitment of the defendant. Determination of such alleged mental illness, commitment and discharge shall be made pursuant to the procedure set forth in the Oklahoma Mental Health Law.

**IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY, OKLAHOMA**

**[JURY VERDICTS (JUNE 26, 1980)]
[CAPTIONS OMITTED IN PRINTING]**

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, find the Defendant, Glen Burton Ake, Guilty of the crime of MURDER IN THE FIRST DEGREE.

/s/ Dale Regier,
Foreman

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, find the Defendant, Glen Burton Ake, Guilty of the crime of Shooting with Intent to Kill, and assess his punishment at Five Hundred (500) years imprisonment.

/s/ Dale Regier,
Foreman

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, find the following statutory aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

1. (x) The murder was especially heinous, atrocious, or cruel;
2. (x) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
3. (x) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

/s/ Dale Regier
Foreman

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, having heretofore found the defendant, Glen Burton Ake, Guilty of the crime of MURDER IN THE FIRST DEGREE, fix his punishment at death.

/s/ Dale Regier
Foreman

IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

GLEN BURTON AKE, ALSO KNOWN AS
JOHNNY VANDENOVER, DEFENDANT.

No. CRF-79-303

JUDGMENT AND SENTENCE

Filed July 28, 1980

NOW, on this 25th day of July, 1980, the same being one of the regular judicial days of the District Court of Canadian County, State of Oklahoma, this cause comes on for hearing Defendant's Motion for New Trial and for Judgment and Sentence, and the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, being present in person and by his counsel, J. Malone Brewer, and the State of Oklahoma being represented by Earl E. Goerke, District Attorney, and Bill James, Assistant District Attorney, Canadian County, State of Oklahoma, and the said defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, having been duly presented and arraigned and having pleaded "Not Guilty" to the offense of MURDER IN THE FIRST DEGREE, as charged in the Information filed herein, having been duly and regularly tried and convicted of said offense in Canadian County, State of Oklahoma, and said Motion for New Trial having been duly presented and argued and the Court, after taking the same under consideration, and being fully advised in the premises finds: That said Motion for New Trial should be overruled.

THEREFORE, it is the JUDGMENT OF THE COURT that the defendant's Motion for New Trial be, and the same is hereby overruled to which ruling of the court defendant excepts and exceptions allowed.

THEREUPON, defendant having been asked by the Court whether he had any legal cause to show why Judgment and Sentence should not be pronounced against him,

in conforming with the verdict of the jury and the defendant giving no good reason why Judgment and Sentence should not be pronounced and none appearing to the Court;

THE COURT DOES HEREBY ADJUDGE AND SENTENCE the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, the punishment by death for the offense of MURDER IN THE FIRST DEGREE in conformity with the verdict of the jury.

IT IS THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that said defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, be conveyed from the bar of this Court to the County Jail of Canadian County, State of Oklahoma, and within ten (10) days thereafter, by D.L. Stedman, Sheriff of Canadian County, State of Oklahoma, transported to the Lexington Assessment and Reception Center, Department of Corrections located at Lexington, Oklahoma, where the warden of said reception center is directed to receive said defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, and cause him to be confined in the center until necessary admission and reception procedures have been accomplished, and thereafter, within thirty (30) days after receiving said defendant, said warden of said center is further directed to cause defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, to be transported and delivered to the Warden of the Oklahoma State Penitentiary at McAlester, Oklahoma.

IT IS FURTHER ORDERED AND DIRECTED that the warden of the State Penitentiary at McAlester, Oklahoma, shall receive, hold and confine said GLEN BURTON AKE, also known as JOHNNY VANDENOVER, until the 10th day of October, 1980, on which date, the warden of the place of incarceration herein designated is commanded to put the said GLEN BURTON AKE, also known as JOHNNY VANDENOVER, to death, within the walls of the State Penitentiary at McAlester, Oklahoma, by continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed

physician according to accepted standards of medical practice, or in any other manner that may be designated by the laws of the State of Oklahoma, in all respects as provided by the law for such execution; and the Clerk of this Court is commanded to deliver to said Sheriff of Canadian County, State of Oklahoma, a certified copy of this Judgment and Sentence, together with the Death Warrant which will be sufficient warrant and authority to said sheriff of Canadian County, State of Oklahoma, and to the Warden of the Lexington Center and to the Warden of the State Penitentiary for the execution of the Judgment and Sentence as herein provided, and each of said officials is commanded to make return of the proceedings had and held in the execution of this sentence and that such return be filed as provided by law.

THEREUPON, the Court notified the defendant of his absolute right to appeal from this Judgment and Sentence to the Court of Criminal Appeals of the State of Oklahoma, and further that such right would be provided whether he had sufficient funds to pay therefor or not. The Court further informed the defendant that provisions were made for an automatic appeal and directed that transcript of the proceedings herein be made and provided to the Oklahoma Court of Criminal Appeals, as required by Statute, to which Judgment and Sentence the defendant did duly except at the time and counsel for defendant gave oral notice in open court of his intent to appeal.

IT IS THEREFORE the judgment and order of the Court that the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, be allowed, and is hereby granted the time allowed by law in which to make, prepare and serve the transcript herein, to all which proceedings, the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, excepted and exceptions allowed.

/s/ James D. Bednar

JAMES D. BEDNAR, Associate District Judge

ATTEST:

/s/ Clyde Gene Miller

CLYDE GENE MILLER, Court Clerk
Canadian County, State of Oklahoma

(SEAL)

COURT OF CRIMINAL APPEALS OF OKLAHOMA

GLEN BURTON AKE, A/K/A JOHNNY VANDENOVER,
APPELLANT,

v.

THE STATE OF OKLAHOMA, APPELLEE.
No. F-80-523

April 12, 1983

An appeal from the District court of Canadian County;
James D. Bednar, Judge.

Glen Burton Ake, a/k/a Johnny Vandenoever, appellant, was convicted of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill in the District Court of Canadian County, Oklahoma, Case Nos. CRF-79-302, CRF-79-303, CRF-79-304, CRF-79-305. He was sentenced to death for each murder count and to 500 years' imprisonment for each shooting with intent to kill count, and appeals. AFFIRMED.

Richard D. Strubhar, Reta M. Strubhar, Yukon, for appellant.

Jan Eric Cartwright, Atty. Gen., Chief, Appellate Crim. Div., Oklahoma City, for appellee.

OPINION

The appellant, Glen Burton Ake, also known as Johnny Vandenoever, was convicted by a jury in Canadian County, Oklahoma, of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill. He was sentenced to death for each of the murder charges, and sentenced to a five-hundred year prison term for each of the shooting with intent to kill counts. He has perfected a timely appeal to this Court.

On the evening of October 15, 1979, in search of a suitable house to burgle, the appellant and his accomplice, Steven Keith Hatch, a/k/a Steven Lisenbee, drove their borrowed car to the rural home of Reverend and Mrs. Richard

Douglass. The appellant gained entrance into the Douglass' home under the pretense that he was lost and needed help finding his way. After an initial conversation with sixteen-year-old Brooks Douglass in the entrance way of the Douglass' home, the appellant returned to his car, supposedly to get a telephone number. The appellant thereupon re-entered the house and produced a firearm. He was joined shortly afterwards by his accomplice, who also was armed.

The appellant and his accomplice ransacked the Douglass' home as they held the family at gunpoint. They bound and gagged Reverend Douglass, Mrs. Douglass and Brooks Douglass, and forced them to lie in the living room floor.

The two men then took turns attempting to rape twelve-year-old Leslie Douglass in a nearby bedroom. Having failed in their attempts, they bound and gagged Leslie, and forced her to lie in the living room floor with the other members of her family.

Throughout the episode, the appellant and his accomplice repeatedly threatened to kill all the members of the Douglass family, and covered their heads with articles of clothing as they lay helpless on the floor.

The appellant instructed his accomplice to go outside, turn the car around, and "listen for the sound." The accomplice left the house as he was told. The appellant then shot Reverend Douglass and Leslie each twice with a .357 magnum pistol, Mrs. Douglass once, and Brooks once; and fled.

Mrs. Douglass died almost immediately as a result of the gunshot wound. Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and drive to the nearby home of a doctor.

The appellant and his accomplice were apprehended in Colorado following a month-long crime spree which took them through Arkansas, Louisiana, Texas, and much of the Western half of the United States.

Subsequent to their extradition to Oklahoma, Leslie Douglass identified the appellant in a lineup. The appellant confessed to the shootings.

The error first alleged by the appellant is that the trial court wrongfully refused to grant a change of venue. He argues the pre-trial publicity concerning the crime and events occurring subsequent thereto, including the fact that the appellant's accomplice had earlier been found guilty of the crimes at issue and sentenced to death, was of such an extent as to bias the community against him, thereby denying him the benefit of an impartial jury.

The appellant failed to comply with the statutory procedure for change of venue mandated by 22 O.S.1981, § 561. The motion was not verified by affidavit, nor was it supported by the affidavits of at least three credible persons residing within the county. Thus, the motion not having been properly before the trial court, is likewise not properly before this Court. See *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Bruton v. State*, 521 P.2d 1382 (Okl.Cr.1974); *Adams v. State*, 25 Okl. Cr. 298, 220 P. 59 (1923). The motion was properly overruled.¹

¹ The murder/shootings of the Douglass family attracted a significant amount of media attention in Oklahoma. Most, if not all, of the jurors in this case had been exposed to various forms of media accounts of the crimes and the events subsequent thereto. The appellant attempts to bolster his contention with the results of a poll conducted on behalf of his accomplice and himself, which indicated that forty-four percent of those surveyed believed the appellant to be guilty prior to his trial. Additionally, the appellant has provided this Court with a copy of an advertisement used by the Sheriff of Canadian County in his bid for re-election, which depicts the handcuffed appellant being escorted by that sheriff. The caption of the picture was, "Quality law enforcement takes a tough, dedicated professional—let's keep Lynn Stedman Sheriff."

It is not necessary that a juror be completely ignorant of the facts and circumstances surrounding a case. It is sufficient if the juror can disregard his/her own opinion and render a verdict based on the evidence presented. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Russell v. State*, 528 P.2d 336 (Okl.Cr.1974). In this case, after extensive examination by counsel for both sides, each juror stated he/she could do so.

In addition, we note that the trial court did not rule on the motion to change venue until completion of the voir dire to determine the extent of the bias, if any, that existed in the minds of the veniremen. The appellant was afforded wide latitude in examination of the veniremen. This procedure afforded the appellant ample time to weed out unsatis-

The appellant next alleges that the trial court erred by not granting a second preliminary hearing in this case. The appellant's preliminary hearing was held conjointly with his accomplice on January 21, 1980. He was ejected from his February 14, 1980, arraignment for disruptive behavior. One week later, the judge who presided at the arraignment, on his own motion, ordered the appellant to undergo psychiatric evaluation. On April 10, 1980, a special sanity hearing was held at which the appellant was found to be mentally ill and ordered committed to Eastern State Mental Hospital for observation and treatment. He was subsequently adjudged competent to stand trial, and the proceedings against him reinstated on May 27, 1980.

The appellant filed a motion requesting a second preliminary hearing. He argued that he was unable to assist his attorneys at the January 21, 1980, preliminary hearing because of his lack of competency. The motion was overruled.

The appellant announced ready at the preliminary hearing. No attempt was made to raise the issue of his ability to assist counsel. We cannot presume, absent any supporting evidence, that the appellant was incompetent at that time. A review of the transcript of the preliminary hearing reveals that the appellant did indeed profit from the preliminary hearing. Counsel for the appellant thoroughly and adequately cross-examined witnesses offered by the State. He raised the issue through cross-examination of the appellant's state of mind during the criminal episode, and challenged one of the surviving victims' identification of the appellant as the man who shot him. The appellant also put on witnesses and obtained copies of police and medical reports.²

factory or biased jurors. Moreover, the appellant waived his last two preemptory challenges. Having done so, he cannot complain of juror bias on appeal. *Carpitcher v. State*, 586 P.2d 75 (Okl. Cr.1978).

² In regard to this matter, we note that the appellant focuses his argument in this allegation of error upon a statement made by the judge while denying the motion. At one point, the judge stated, "It [the preliminary hearing] is not designed as a deposition-type hearing for the defendant to make a great deal of discovery." Although the language of *Beard v. Ramey*, 456 P.2d 587 (Okl.Cr.1969), reveals the erroneous flavor of the judge's statement, we find it to be of little consequence.

The appellant failed to preserve the issue in the motion for a new trial. Had any error concurred, it was thereby waived. *Stevenson v. State*, 637 P.2d 878 (Okl.Cr. 1981).

In addition, the appellant has not shown he was prejudiced at trial by the failure to grant the second preliminary hearing. There was no fundamental error. We conclude that the judge did not abuse his discretion.

The appellant alleges in his next assignment of error that a prospective juror was dismissed in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).³

We find no error in this matter. The form and substance of the questions were very similar to those we approved in *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980); and the an-

As demonstrated in the text, the preliminary hearing did in fact work as a discovery device for the appellant.

Additionally, we note that the judge did not base his ruling solely on this factor. Thus, the appellant's argument, while possessing some merit, gains him nothing.

³ The appellant's argument revolves around the following dialogue excerpted from the record:

THE COURT: This is a case in which the State of Oklahoma is seeking the death penalty, and I will ask you this question. In a case where the law and the evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the death penalty?

MRS. WOLFE: No, sir, I could not.

THE COURT: All right. Let me ask you this. Knowing that the law provides for the death penalty in certain proper cases, and knowing that the State will ask you to bring back a verdict of death in this case, and considering your reservations about the death penalty, do you have such conscientious opinions as would prevent you from making an impartial decision as to whether the defendant is guilty or not guilty?

MRS. WOLFE: Sir, I could not impose the death penalty on anyone.

THE COURT: All right. I need to ask you one other question. If you found beyond a reasonable doubt that the defendant was guilty of Murder in the First Degree, and if under the evidence, facts, and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such that regardless of the law, the facts, and circumstances of the case, you still would not consider fairly the imposition of the death penalty?

MRS. WOLFE: No, Sir.

swers given by the juror indisputably satisfy the Witherspoon concerns. See, 88 S.Ct, at 1777 n. 21.

In addition, the appellant did not examine the prospective juror, did not object when she was excused, and did not preserve the error in the motion for a new trial. Thus, had any error occurred, it was waived. *Hays v. State*, 617 P.2d 223 (Okl. Cr.1980).

The appellant's ninth assignment of error is that he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist and a court-appointed investigator as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses.

We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes. *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); and cases cited therein.

In addition, the argument was not preserved in the motion for new trial. It was thereby waived. *Hawkins v. State*, 569 P.2d 490 (Okl.Cr.1977).

The appellant's next two allegations of error concern the fact that he was sustained on 600 milligrams of Thorazine per day throughout his trial. The medication was administered pursuant to the orders of the doctors who treated him at Eastern State Hospital at Vinita. Dr. R.D. Garcia informed Judge Martin (who was originally to preside over the case) by letter dated May 22, 1980, that the appellant was competent to stand trial, and could assist his attorney, provided he continue taking the prescribed medication.

The appellant remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings. He argues that, because of the effect of the Thorazine, he was not actually present at his trial; and thereby denied his statutory and constitutional rights. Secondly, he argues that, due to his conduct at trial, the trial court should have halted the proceedings and impaneled a jury to evaluate his present sanity.

Both of these issues boil down to the question of whether the thorazine medication rendered him unable to understand the proceedings against him and affected his ability to assist counsel. (*Okl.Cr.1981*).

Dr. Garcia testified that he had diagnosed the appellant's condition as schizophrenia of the paranoid type, which necessitated maintenance on the Thorazine to stabilize his personality. Dr. Garcia further testified that, although the dosage of Thorazine which the appellant was taking would sedate a normal individual, it had a therapeutic effect of eliminating the symptoms of the appellant's condition. Without the benefit of the medication, the appellant could revert to a violent and dangerous state.

In the letter to Judge Martin, referred to above, Dr. Garcia stated the appellant, with the benefit of medication, was competent to stand trial and assist his attorneys in his defense. The appellant remained on his prescribed medication, and there is no evidence that any change in his competency occurred in the month between his release from Vinita and his trial. Thus, we have no reason to believe the appellant's behavior was caused by any factor other than his own volition.⁴

The appellant additionally asserts that, according to *Peters v. State*, 516 P.2d 1372 (*Okl.Cr.1973*), the trial court was under a duty to first cite the appellant for contempt of court, and, secondly to bind and gag him before allowing the use of drugs to sedate him through his trial. This argument misconstrues the purpose behind the medication given the appellant. The appellant's disruptive behavior at his preliminary hearing gave rise to the proceedings which eventually led to his commitment at Vinita and ensuing treatment with Thorazine. However, even though the treatment indirectly resulted from the appellant's misbe-

⁴ It is quite possible that the defense of insanity interposed by the appellant fostered such behavior on his part. Nonetheless, the injury was well aware of the fact that the appellant was being maintained on the Thorazine. The appellant was present throughout the trial, and his demeanor was readily discernable by the jurors. Notwithstanding the appellant's "abnormal" behavior at trial, the jury determined that he was sane.

havior, the Thorazine was not administered to him for the sole purpose of rendering him sufficiently tranquil to facilitate progress of the criminal proceedings instituted against him. Thus, the appellant's reliance on *Peters* is misplaced.

Likewise, we disagree with the contention that the appellant should have been treated as an insane person, incapable of standing trial, because of the necessity of Thorazine treatment to "normalize" him. Psychopharmaceutical restoration of persons to a state of normality is not an uncommon practice in modern society. If a defendant may be rendered competent to assist in his defense through the use of medication, it is in the best interests of justice to afford him a speedy trial. See, *State v. Stacy*, 556 S.W.2d 552 (Tenn. Cr. 1977); and cases cited therein. See also, *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (1976).⁵

Concerning the trial court's failure to impanel a jury to determine the present sanity of the appellant, we note initially that the appellant's attorneys voluntarily withdrew the motion for trial on present sanity because the appellant had just been returned from Vinita, certified as competent to stand trial. Since the motion was withdrawn, the court obviously had no occasion to rule on it. We cannot say that the court was under a duty to raise the issue *sua sponte*. In light of the facts that the appellant had been released from Vinita one month before, certified as competent to stand trial, and that he was maintaining his medication; the trial court had no good reason to order a trial on the appellant's present sanity. Although the appellant's refusal to communicate with his attorneys was brought to the attention of the trial judge, and although the appellant's demeanor was observable, it does not necessarily follow that the trial court was bound to deduce from such behavior that another hearing was needed.

⁵ One notable case contra to our holding is *State v. Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971), wherein it was held that a defendant was improperly tried while being maintained on medication. The defendant in that case stared vacantly ahead throughout the trial as did the appellant in this case. It must be noted, however, that the defendant in that case was taking a combination of several drugs, all of which were known to be strong depressants with notable side effects.

According to the statute authorizing trials on present sanity, a doubt must arise as to the defendant's sanity. 22 O.S.1981, § 1162. The doubt referred to in the statute has been interpreted to be doubt which must arise in the trial court's mind after an evaluation of the facts, information concerning the defendant's insanity and motive. *Beck v. State*, supra. *Reynolds v. State*, 575 P.2d 628 (Okl.Cr.1978); *Russell v. State*, supra. The existence of doubt of the defendant's sanity must arise from facts and circumstances of a substantial character. There must be reason to believe that the defendant's claim of insanity is genuine and not simulated to delay justice. *Bingham v. State*, 82 Okl.Cr. 5, 165 P.2d 646 (1946); *Laslovich v. State*, 377 P.2d 977 (Okl.Cr.1963). The appellant's demeanor was but one factor to consider in light of the facts and circumstances in this case. We cannot say the judge abused his discretion in failing to order a trial on present sanity. *Reynolds*, supra; *Beck*, supra.

Initially, the appellant argues he was insane when he made the confession, thus it was involuntary. However, the appellant failed to establish any doubt of his sanity at the time the crime was committed. The sheriff who took the confession testified the appellant understood his rights, and voluntarily waived them. The confession was lucid and detailed. The appellant read the lengthy typewritten copy of the confession, corrected spelling errors and filled in missing details. Lastly, although the appellant was adjudged incompetent to stand trial approximately five months after the crime was committed, none of the psychologists who examined him could offer an opinion of the state of the appellant's mental condition prior to the time they observed him.

We are of the opinion the confession was knowingly and voluntarily given. See, *Wadkins v. State*, 572 P.2d 998 (Okl.Cr. 1977).

The appellant's second allegation concerning the confession stems from the fact that the trial court deleted parts of the confession, because it contained information of other crimes committed by the appellant and his accomplice subsequent to the Douglass shootings. The deleted confession contained blank spaces and blank pages. The appellant

maintains that the confession, in its deleted form, was prejudicial.

This allegation of error was not preserved in the motion for new trial. It has thus not been properly preserved for appeal. *Turman v. State*, 522 P.2d 247 (Okl.Cr.1974). In addition, we do not agree that the appellant was prejudiced by the form of the confession.

In the appellant's fifth assignment of error, he argues that numerous photographs were unduly prejudicial and should not have been admitted into evidence. A review of both the trial transcript and the exhibits before us in the record reveals that all but one of the photographs complained of were indeed excluded by the trial court pursuant to the appellant's objection. The photograph which was admitted over the appellant's objections portrayed the nature in which one of the victim's feet were bound. The photograph served to demonstrate how the appellant in this case rendered his victim helpless before he brutally murdered him. The photograph was not gruesome, and did not unfairly prejudice the appellant. The trial court did not abuse its discretion in admitting the picture. *Holloway v. State*, 602 P.2d 218 (Okl.Cr.1979).

Next, the appellant alleges the trial court erred by allowing Brooks and Leslie Douglass, the two surviving victims, to testify concerning the appellant and his cohort's attempt to rape Leslie. He traditionally argues that the trial court erroneously failed to instruct the jury concerning the alleged other crimes.

The appellant failed to object to the testimony of which he now complains. Additionally, he failed to include it in the motion for new trial. The appellant has completely failed to bring the error, if any, to the attention of the trial court. As we stated in *Burks v. State*, 594 P.2d 771 (Okl. Cr.1979), it is incumbent upon the defense attorney to raise an objection to the introduction of evidence of other crimes, lest the error be waived.

In addition, we hold that the admission of the testimony and the trial court's failure to give a limiting instruction was harmless. The evidence presented against the appellant in both stages of the trial was overwhelming. We are

convinced that the jury would have rendered the same verdict and imposed the same sentences had the evidence not been presented, or had the instruction been given. *Burks supra*; *Luman v. State*, 626 P.2d 869 (Okl.Cr.1981).

The appellant's twelfth and thirteenth allegations are that the prosecutor impassioned the jury with improper arguments in both stages of the trial.

The prosecutor stated numerous times in the closing argument of the first stage that there was "no doubt" the appellant was guilty. The prosecutor was permissibly arguing the State's conclusions based upon the evidence in the case. *Williams v. State*, 557 P.2d 920 (Okl.Cr.1976). In addition, the authority cited by the appellant in support of his argument are clearly inapplicable. See, *Evans v. State*, 546 P.2d 284 (Okl.Cr.1976) (wherein the prosecutor stated, "And I think you'll return a verdict of guilty because that's what I think he is.").

The prosecutor in this case also stated that, "If we hadn't had these charges pending, he [the appellant] would have gone out on the street a free man." The statement was made in response to the appellant's argument that, if found to be insane, he would not be "turned loose." The prosecutor argued that the appellant had been sent to a mental hospital, treated and released. Thus, the gist of the prosecutor's argument was that the appellant would be, in effect, set free if found to be insane.

Although the prosecutor would have been better advised not to make such an argument, we do not find it of such magnitude to mandate modification or reversal. *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980). The Jury was properly instructed concerning the consequences of an innocent by reason of insanity verdict. In addition, the evidence against the appellant was so over-whelming that it is inconceivable the verdict was based solely on such a remark. *Chaney, supra*.

The appellant additionally complains of remarks made by the prosecutor during the second stage of the trial. The appellant admits in his brief that no objections were made. After careful examination of the record, we can find no error which rises to the level of fundamental error.

The appellant's tenth assignment of error concerns a note from the jury in which it was requested that the testimony of Dr. R.D. Garcia, a psychologist who testified for the defense, be repeated. The trial court declined to have a transcript of the testimony sent to the jury. The appellant alleges error on two grounds; first, that the jurors were not brought into open court for consideration of the note, pursuant to 22 O.S. 1981, § 894, and secondly that Dr. Garcia's testimony was not read to the jury.

The appellant failed to object to the jury's absence during the court's discussion of the note. In addition, he failed to properly preserve the argument for appeal in the motion for new trial. Nonetheless, we note that the trial court replied to the jury's request in writing, and that counsel for both sides were given opportunity to object to both the form and substance of the note. As we stated in *Boyd v. State*, 572 P.2d 276 (Okl.Cr.1977), the purpose of 22 O.S.1981, § 894, is to prevent certain communications from being made outside of open court which might influence the jury when both parties have had a chance to be present to protect their interests. Thus, although the jury should have been returned to the courtroom pursuant to § 894, failure to do so here was harmless. *Boyd, supra*; see also, *Starr v. State*, 602 P.2d 1046 (Okl.Cr.1979).

In response to the appellant's second argument that the jury should have been allowed to rehear Dr. Garcia's testimony, we note that the decision to allow or disallow the jury's request lies within the discretion of the trial court. *James v. State*, 456 P.2d 610 (Okl.Cr.1969). The appellant contends that, as evidenced by the "choppy record," it was difficult for the jury to understand Dr. Garcia's testimony. We cannot agree with the appellant's assessment of the nature of Dr. Garcia's transcribed testimony. From the record before us, we have no reason to believe that the jury did not hear and understand Dr. Garcia's testimony as it was given in court. Accordingly, we decline to hold that the trial court abused its discretion. *Jones, supra*.

The appellant next alleges that the lack of air conditioning in the courthouse in which the trial and jury deliberations were conducted forced the jury to return the ver-

dict without proper deliberation. The appellant has failed to cite, nor can we find, any evidence in the record to support such a contention. Although the courtroom may have been somewhat uncomfortable, there is no evidence that the jury failed to exercise utmost diligence in reaching its verdict. Indeed, upon having been given the opportunity to recess for the night, and wait until the following morning to begin deliberations in the second stage, the jury elected to remain and deliberate. The contention is clearly without merit.

In his fifteenth allegation of error, the appellant maintains that the verdict was against the clear weight of the evidence. He argues the jury should have returned a verdict of not guilty by reason of insanity.

In every case there is an initial presumption of sanity. This presumption remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State. *Rogers v. State*, 634 P.2d 743 (Okl.Cr.1981); *Richardson v. State*, 569 P.2d 1018 (Okl.Cr.1977).

The appellant had no history of mental illness. When each of the three doctors who testified on behalf of the appellant was asked whether he had an opinion as to the appellant's ability to distinguish between right and wrong at the time of the shootings, each answered in the negative. They could only testify as to their opinions that the appellant was "mentally ill" several months after the crimes had occurred.

The appellant clearly failed to establish any reasonable doubt as to his sanity at the time the crimes were committed. The jury was properly instructed concerning the standard of sanity and the burden of proof. We cannot agree that the jury's verdict was against the weight of the evidence. *Rogers*, supra.

The appellant's eighteenth assignment of error is that the accumulation of errors alleged in the foregoing assignments of error mandates reversal in this case. We have held in the past that if a defendant's previous assignments of error are found to be without merit, the argument which asks that

those previous allegations be considered collectively is likewise without merit. *Brinlee v. State*, 543 P.2d 744 (Okl.Cr.1975); *Haney v. State*, 503 P.2d 909 (Okl.Cr.1972). Since we have found all of the appellant's allegations of error to be without merit, we find this argument meritless also.

The appellant's seventeenth allegation of error is that the felony-murder doctrine is unconstitutional. This allegation is not properly before this Court, as it was not preserved in the motion for new trial. *Turman v. State*, supra.

The appellant argues in his nineteenth assignment of error that the statutory scheme of 21 O.S.1981, § 701.11 unconstitutionally shifts the burden of proving mitigating circumstances onto defendants in capital cases after aggravating circumstances are proven by the State.

We note initially that the issue is not properly before this Court, because it was not preserved in the motion for new trial. *Turman v. State*, supra. Nonetheless, due to the nature of the contention, we shall consider it.

In support of his contention, the appellant cites *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In Re: Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Bauer v. State*, 3 Okl.Cr. 529, 107 P. 525 (1971); and *Pettigrew v. State*, 554 P.2d 1186 (Okl.Cr.1976). None of the authority cited supports the appellant's contention. These cases stand for the rule that a defendant in a criminal case cannot be constitutionally required to produce evidence to negate or mitigate the degree of a criminal charge against him. *Mullaney v. Wilbur*, supra.

In the present case, the statute in question addresses the nature of the punishment to be imposed after the determination of guilt has been made. Thus, the considerations relevant to the guilt determination espoused in the cases cited by the appellant are inapplicable. The appellant was not required to produce any evidence in support of mitigation at all. However, since he chose to have the jury consider factors which he hoped to justify his appeal for leniency, it was incumbent upon him to prove their existence. The defendant is in the best position to know of and present evi-

dence in mitigation. See, *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (Ariz.Sup.1978). To hold a defendant in a capital case to proof of mitigating circumstances in the sentencing stage of a bifurcated trial, should he so chose to raise them, is not contrary to the Due Process principle that the State must carry the burden of proving a defendant's guilt beyond a reasonable doubt. *Winship*, supra; *Mullaney*, supra; *Watson*, supra.

Lastly, we review the sentences imposed upon the appellant as mandated by 21 O.S.1981, § 701.13.

We are of the opinion that the sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor. Our discussion of the appellant's various allegations concerning this issue in the text of this opinion reveal that the appellant's sentences were imposed in accordance with the evidence presented, free from the taint of passion and prejudice. In addition, as previously discussed, the evidence against the appellant was overwhelming in both stages, and provide ample justification for the penalty imposed.

Likewise, we are of the opinion the evidence supports the finding of the aggravating circumstances justifying the imposition of the death penalty to be: 1) that the murder was especially heinous, atrocious or cruel; 2) that the murders were committed to avoid or prevent a lawful arrest or prosecution; and 3) that a probability existed that the appellant would commit criminal acts of violence that would constitute a continuing threat to society.

The appellant in this case invaded the sanctity of his victims' home, bound each one and forced them to lie in the floor. The appellant and his accomplice discussed killing the family, and made them promise not to call the police if allowed to live. Unheeded by Mrs. Douglass' plea for their lives, the appellant ruthlessly emptied a .357 magnum pistol into the bodies of the helpless victims before he fled their home. We believe the facts adequately support each of the three aggravating circumstances found by the jury.

Lastly, we find that the sentences of death are not excessive or disproportionate to those imposed in other cases.⁶

We have also compared this case to other capital cases which have been modified to life or reversed for other reasons.⁷

Having fully reviewed the record and arguments presented on appeal, we find no reason to interfere with the jury's decision. The judgments and sentences are **AFFIRMED**.

CORNISH and BRETT, JJ., concur.

⁶ *Smith v. State*, 659 P.2d 390, 54 OBAJ 452 (Okla.Cr.1983); *Parks v. State*, 651 P.2d 686 (Okla.Cr.1982); *Jones v. State*, 648 P.2d 1251 (Okla.Cr.1982); *Hays v. State*, 617 P.2d 223 (Okla.Cr.1980); *Eddings v. State*, 616 P.2d 1159 (Okla.Cr.1980) (remanded for resentencing, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1); *Chaney v. State*, 612 P.2d 269 (Okla.Cr.1980).

⁷ *Jones v. State*, 660 P.2d 634, 54 OBAJ 661 (Okla.Cr.1983); *Driskell v. State*, 659 P.2d 343, 54 OBAJ 460 (Okla.Cr.1983); *Boutwell v. State*, 659 P.2d 322, 54 OBAJ 402 (Okla.Cr.1983); *Munn v. State*, 658 P.2d 482, 54 OBAJ 402 (Okla.Cr.1983); *Odum v. State*, 651 P.2d 703 (Okla.Cr.1982); *Hall v. State*, 650 P.2d 898 (Okla.Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okla.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okla.Cr.1982); *Franks v. State*, 636 P.2d 361 (Okla.Cr. 1981); *Irvine v. State*, 617 P.2d 588 (Okla.Cr.1980); *Hager v. State*, 612 P.2d 1369 (Okla.Cr.1980).

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

GLEN BURTON AKE, A/K/A/ JOHNNY VANDENOVER,
PETITIONER,

vs

THE STATE OF OKLAHOMA, RESPONDENT

No. F-80-523

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING ISSUANCE OF MANDATE
FILED JUNE 15, 1983

NOW on this 15th day of June, 1983, after having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS
COURT this 15th day of June, 1983.

/s/ Hez J. Bussey

HEZ J. BUSSEY, *Presiding*

/s/ Tom R. Cornish

TOM R. CORNISH, *Judge*

/s/ Tom Brett

Tom Brett, *Judge*

ATTEST:

/s/ Ross N. Lillard J.
Clerk

In the Supreme Court of the United States

No. 83-5424

GLEN BURTON AKE, PETITIONER,

v.

OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI to the
Court of Criminal Appeals of the State of Oklahoma.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 19, 1984

No. 83-5424

FILED

JUN 2 1984

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

GLEN BURTON AKE, *Petitioner*,

v.

STATE OF OKLAHOMA, *Respondent*.

On Writ Of Certiorari To The
Oklahoma Court Of Criminal Appeals

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QUESTIONS PRESENTED

1. When an indigent defendant's sanity at the time of the offense is seriously in issue, can a State constitutionally refuse to provide any opportunity whatsoever for him to obtain the psychiatric assistance and examination necessary to prepare and establish his insanity defense?

2. When a State seeks in a capital case to prove the aggravating circumstance of future dangerousness through psychiatric testimony, can it constitutionally refuse to provide an indigent defendant with psychiatric assistance to rebut that testimony and to develop and present mitigating evidence?

3. Can a State constitutionally put a defendant on trial, without making any inquiry into his competency, when he is involuntarily receiving psychoactive medication that renders him unable to participate in his defense and prejudices his appearance before the jury?

PARTIES TO THE PROCEEDING

The only parties to this proceeding, in this Court or below, are the petitioner (defendant below) Glen Burton Ake and the respondent State of Oklahoma.

Steven Keith Hatch was the defendant in a consolidated case arising out of the same events, but was ultimately tried separately.

TABLE OF CONTENTS

	Page
Decisions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Summary of Argument	15
Argument:	
I. When an indigent defendant's sanity at the time of the offense is seriously in issue, the State may not deny him the means to establish his insanity defense	18
A. The Constitution requires that indigent defendants be provided with reasonably necessary expert assistance	18
B. An expert examination of petitioner's mental condition at the time of the offense was reasonably necessary in this case	28
II. In a capital case, the State may not deny an indigent defendant the means of presenting evidence in mitigation of punishment and in rebuttal of the State's evidence of aggravating circumstances ...	37
A. An indigent defendant facing the death penalty is entitled to reasonably necessary expert assistance to prepare and present evidence in his favor at the sentencing hearing	39
B. Where the State uses psychiatric testimony to establish the aggravating circumstance of predictable future violence, it may not deny an indigent defendant psychiatric assistance to rebut that testimony	41
III. Petitioner's drugged condition during trial deprived him of the ability to assist counsel and prejudiced him in the eyes of the jury	42
A. The trial court failed to inquire into petitioner's competency when such an inquiry was constitutionally required	44
B. Petitioner's competency to stand trial cannot be sustained on this record	45

Table of Contents Continued

	Page
C. The side-effects of the drug administered to petitioner prejudiced him before the jury ...	46
Conclusion	50
Appendix	1a

TABLE OF AUTHORITIES

CASES:	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	32, 35
<i>Ake v. State</i> , 663 P.2d 1 (Okla. Crim. App. 1983)	10, 11, 13, 29, 42
<i>Barefoot v. Estelle</i> , 103 S.Ct. 3383 (1983)	16, 38, 41
<i>Beavers v. Balkcom</i> , 636 F.2d 114 (5th Cir. 1981)	33
<i>Betts v. Brady</i> , 316 U.S. 455 (1942)	36
<i>Bills v. State</i> , 585 P.2d 1366 (Okla. Crim. App. 1978) .	33
<i>Blake v. Zant</i> , 513 F.Supp. 772 (S.D. Ga. 1981), <i>aff'd in part and rev'd in part sub nom. Burger v. Zant</i> , 718 F.2d 979 (11th Cir. 1983), <i>vacated and remanded on other grounds</i> , 52 U.S.L.W. 3860 (U.S. May 29, 1984)	34
<i>Blocker v. United States</i> , 288 F.2d 853 (D.C. Cir. 1961)	31
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977)	26, 27
<i>Brinkley v. United States</i> , 498 F.2d 505 (8th Cir. 1974)	37
<i>Brinks v. Alabama</i> , 465 F.2d 446 (5th Cir. 1972), <i>cert. denied</i> , 409 U.S. 1130 (1973)	33
<i>Burger v. Zant</i> , 718 F.2d 979 (11th Cir. 1983), <i>vacated and remanded on other grounds</i> , 52 U.S.L.W. 3860 (U.S. May 29, 1984)	24, 34
<i>Bush v. McCollum</i> , 231 F.Supp. 560 (N.D. Tex. 1964), <i>aff'd per curiam</i> , 344 F.2d 672 (5th Cir. 1965)	21, 33, 34
<i>Bush v. State</i> , 172 Tex. Crim. 54, 353 S.W.2d 855 (1962), <i>rev'd sub nom. Bush v. Texas</i> , 372 U.S. 586 (1963)	34
<i>Bush v. Texas</i> , 372 U.S. 586 (1963)	34
<i>Chaffin v. Stynchcombe</i> , 412 U.S. 17 (1973)	49
<i>Christian v. United States</i> , 398 F.2d 517 (10th Cir. 1968)	24
<i>Commonwealth v. Bolduc</i> , 10 Mass. App. 634, 411 N.E.2d 483 (1980)	24
<i>Commonwealth v. Phelan</i> , 427 Pa. 265, 234 A.2d 540 (1967), <i>cert. denied</i> , 391 U.S. 920 (1968)	24
<i>Cox v. State</i> , 644 P.2d 1077 (Okla. Crim. App. 1982) ..	40
<i>Davis v. State</i> , 374 So.2d 1293 (Miss. 1979)	26
<i>Douglas v. California</i> , 372 U.S. 353 (1963)	26, 27, 41

Table of Authorities Continued

	Page
<i>Doyle v. Ohio</i> , 426 U.S. 610 (1976)	29
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	17, 35, 44, 46
<i>Dutton v. State</i> , 434 So.2d 853 (Ala. Crim. App. 1983)	26
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	37, 38
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982)	35
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	26
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981)	30
<i>Estelle v. Williams</i> , 425 U.S. 501 (1976)	48
<i>Ex Parte Duffy</i> , 607 S.W.2d 507 (Tex. Crim. App. 1980)	33
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	15, 18, 26, 29, 31, 32, 36
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	37
<i>Griffin v. California</i> , 380 U.S. 609 (1965)	29
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	15, 16, 18, 26, 27
<i>Herring v. New York</i> , 422 U.S. 853 (1975)	21
<i>Himes v. State</i> , 403 N.E.2d 1377 (Ind. 1980)	24
<i>Hintz v. Beto</i> , 379 F.2d 937 (5th Cir. 1967)	24
<i>In re K.K.B.</i> , 609 P.2d 747 (Okla. 1980)	47
<i>In re Pray</i> , 133 Vt. 253, 336 A.2d 174 (1975)	48
<i>In re Roe</i> , 383 Mass. 415, 421 N.E.2d 40 (1981)	43, 47
<i>In re Winship</i> , 397 U.S. 358 (1970)	28
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976)	38
<i>Little v. Streater</i> , 452 U.S. 1 (1981)	27
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	42
<i>Martin v. Commonwealth</i> , 221 Va. 436, 271 S.E.2d 123 (1980)	26
<i>Mason v. Arizona</i> , 504 F.2d 1345 (9th Cir. 1974), <i>cert.</i> <i>denied</i> , 420 U.S. 936 (1975)	24
<i>Matlock v. Rose</i> , 731 F.2d 1236 (6th Cir. 1984)	24
<i>McKenzie v. Osborne</i> , 640 P.2d 368 (Mont. 1981)	25
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970)	26

Table of Authorities Continued

	Page
<i>Norris v. Alabama</i> , 294 U.S. 587 (1935)	46
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966)	17, 44
<i>Pedrero v. Wainwright</i> , 590 F.2d 1383 (5th Cir.), <i>cert.</i> <i>denied</i> , 444 U.S. 943 (1979)	36
<i>People v. Bryant</i> , 77 Mich. App. 108, 258 N.W.2d 162 (1977)	33
<i>People v. India</i> , 32 N.Y.2d 230, 298 N.E.2d 65, <i>cert.</i> <i>denied</i> , 414 U.S. 850 (1973)	24
<i>People v. McCrary</i> , 190 Colo. 538, 549 P.2d 1320 (1976)	24
<i>People v. Watson</i> , 36 Ill. 2d 228, 221 N.E.2d 645 (1966)	21, 24
<i>People v. Worthy</i> , 109 Cal. App. 3rd 514, 167 Cal. Rptr. 402 (1980)	24
<i>Pierce v. State</i> , 251 Ga. 590, 308 S.E.2d 367 (1983) ...	24
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932) ..	15, 19, 26, 31, 32
<i>Proffitt v. United States</i> , 582 F.2d 854 (4th Cir. 1978), <i>cert. denied</i> , 447 U.S. 910 (1980)	23, 33
<i>Ray v. United States</i> , 367 F.2d 258 (8th Cir. 1966), <i>cert.</i> <i>denied</i> , 386 U.S. 913 (1967)	24
<i>Reilly v. Barry</i> , 250 N.Y. 456, 166 N.E. 165 (1929) ..	19
<i>Roberts v. LaVallee</i> , 389 U.S. 40 (1967)	26
<i>Smith v. Estelle</i> , 445 F. Supp. 647 (N.D. Tex. 1977), <i>aff'd</i> , 602 F.2d 694 (5th Cir. 1979), <i>aff'd</i> , 451 U.S. 454 (1981)	42
<i>Solesbee v. Balkcom</i> , 339 U.S. 9 (1950)	30
<i>State v. Anaya</i> , 456 A.2d 1255 (Me. 1983)	24
<i>State v. Campbell</i> , 215 N.W.2d 227 (Iowa 1974)	24
<i>State v. Chapman</i> , 365 S.W.2d 551 (Mo. 1963)	25
<i>State v. Clemons</i> , 168 Conn. 395, 363 A.2d 33, <i>cert. de-</i> <i>nied</i> , 423 U.S. 855 (1975)	24
<i>State v. Cunningham</i> , 18 Wash. App. 517, 569 P.2d 1211 (1977)	24
<i>State v. Madison</i> , 345 So.2d 485 (La. 1977)	24

Table of Authorities Continued

	Page
<i>State v. Maryott</i> , 6 Wash. App. 96, 492 P.2d 239 (1971)	48
<i>State v. Murphy</i> , 56 Wash. 2d 761, 355 P.2d 323 (1960)	48
<i>State v. Murphy</i> , 89 S.D. 486, 234 N.W.2d 54 (1975)	24
<i>State v. Olin</i> , 103 Idaho 391, 648 P.2d 203 (1982)	24
<i>State v. Parton</i> , 303 N.C. 55, 277 S.E.2d 410 (1981)	24
<i>State v. Rush</i> , 46 N.J. 399, 217 A.2d 441 (1966)	24
<i>State v. Second Judicial District Court</i> , 85 Nev. 241, 453 P.2d 421 (1969)	24
<i>State v. Taylor</i> , 202 Kan. 202, 447 P.2d 806 (1968)	24
<i>State v. Williams</i> , 657 S.W.2d 405 (Tenn. 1983)	26
<i>State v. Wood</i> , 648 P.2d 71 (Utah), <i>cert. denied</i> , 103 S.Ct. 341 (1982)	40
<i>Strickland v. Washington</i> , No. 82-1554 (U.S. May 14, 1984)	15, 16, 39
<i>Thessen v. State</i> , 454 P.2d 341 (Alaska 1969), <i>cert. denied</i> , 396 U.S. 1029 (1970)	25
<i>United States v. Bass</i> , 477 F.2d 723 (9th Cir. 1973)	33, 37
<i>United States v. Chavis</i> , 486 F.2d 1290 (D.C. Cir. 1973)	33
<i>United States v. Cronin</i> , No. 82-660 (U.S. May 14, 1984)	21
<i>United States v. Decoster</i> , 624 F.2d 196 (D.C. Cir. 1976)	24
<i>United States v. Durant</i> , 545 F.2d 823 (2d Cir. 1976)	37
<i>United States v. Edwards</i> , 488 F.2d 1154 (5th Cir. 1974)	32
<i>United States v. Harris</i> , 542 F.2d 1283 (7th Cir. 1976)	37
<i>United States v. Johnson</i> , 238 F.2d 565 (2d Cir. 1956), <i>vacated and remanded</i> , 352 U.S. 565 (1957)	24
<i>United States v. Lincoln</i> , 542 F.2d 746 (8th Cir. 1976), <i>cert. denied</i> , 429 U.S. 1106 (1977)	33
<i>United States ex rel. Robinson v. Pate</i> , 345 F.2d 691 (7th Cir. 1965), <i>aff'd in part and remanded in part</i> , 383 U.S. 375 (1966)	24
<i>United States ex rel. Smith v. Baldi</i> , 344 U.S. 561 (1953)	5, 18, 35, 36, 37
<i>United States v. Theriault</i> , 440 F.2d 713 (5th Cir. 1971), <i>cert. denied</i> , 411 U.S. 984 (1973)	31, 37

Table of Authorities Continued

	Page
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	35
<i>Watson v. Cameron</i> , 312 F.2d 878 (D.C. Cir. 1962)	20
<i>Westbrook v. Zant</i> , 704 F.2d 1487 (11th Cir. 1983)	39
<i>Williams v. Martin</i> , 618 F.2d 1021 (4th Cir. 1980)	24
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	38, 42
<i>Wright v. United States</i> , 250 F.2d 4 (D.C. Cir. 1957)	35
<i>Young v. Commonwealth</i> , 585 S.W.2d 378 (Ky. 1979)	24
<i>Zant v. Stephens</i> , 103 S.Ct. 2733 (1983)	42
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
U.S. Const. Amend. V	29
U.S. Const. Amend. VI	21, 23
U.S. Const. Amend. VIII	26, 37, 42
U.S. Const. Amend. XIV	15, 18, 29, 42
18 U.S.C. § 3006A (1983)	23, 27
Fed. R. Evid. 702 advisory committee note	19
Ariz. Rev. Stat. Ann. § 13-4013(B) (1978)	25
Cal. Penal Code § 987.9 (West Supp. 1984)	25
Fia. R. Crim. Pro. 3.216(a) (West Supp. 1983)	26
Hawaii Rev. Stat. § 802-7 (1968)	25
Ill. Rev. Stat. ch. 38 § 113-3(d) (West Supp. 1983)	25
Ind. Code Ann. § 35-5-2-2 (Burns 1975)	26
Iowa Code Ann. § 813.2 (West 1979)	25
Kan. Stat. Ann. § 22-4508 (1981)	25
Mass. Gen. Laws Ann. ch. 261, §§ 27A, 27C(4) (West Supp. 1984)	25
Mich. Comp. Laws Ann. § 768.20a(3) (1982)	26
Minn. Stat. Ann. § 611.21 (West Supp. 1984)	25
Mo. Rev. Stat. § 600.150 (1978)	25
Nev. Rev. Stat. § 7.135 (Supp. 1980)	25
N.H. Rev. Stat. Ann. § 604-A:6 (1974)	25
N.M. Stat. Ann. § 31-16-13 (1978)	25

Table of Authorities Continued

	Page
N.Y. County Law § 722-c (McKinney 1979)	25
N.C. Gen. Stat. § 7A-454 (1981)	25
Okla. Stat. tit. 20 § 1304(b)(3) (1980)	28
Okla. Stat. tit. 22 § 1171 (1971)	2, 4
Okla. Stat. tit. 22 § 1175.2 (1980)	45
Okla. Stat. tit. 43A §§ 54.4(F), 56 (1980)	30
Or. Rev. Stat. § 135.055(4) (Supp. 1981)	25
Pa. Stat. Ann. tit. 16, §§ 9960 <i>et seq.</i> (Purdon Supp. 1983) ..	26
Pa. Stat. Ann. tit. 19 § 784 (Purdon 1964 & Supp. 1983) ..	25
S.C. Code Ann. § 17-3-80 (Law. Co-op. 1976)	26
Tex. Code Crim. Proc. Ann. art. 26.05 § 1 (Vernon 1979) ..	26
Wash. Rev. Code §§ 10.77-020(2), 10.77.060 (1980)	26
W. Va. Code § 51-11-8 (1981)	26
MEDICAL REFERENCES:	
E. Bassuk & S. Schoonover, <i>The Practitioner's Guide to Psychoactive Drugs</i> (1977)	46
Davis, <i>Antipsychotic Drugs</i> , in 3 <i>Comprehensive Textbook of Psychiatry</i> (H. Kaplan, A. Freedman & B. Sadock 3rd ed. 1980)	47
T. DuQuesne & J. Reeves, <i>A Handbook of Psychoactive Medicines</i> (1982)	45, 47
Greenblatt, Shader & DiMascio, <i>Extrapyramidal Effects</i> , in <i>Psychotropic Drug Side Effects</i> (R. Shader & A. DiMascio eds. 1977)	48
R. Herrington & M. Lader, 5 <i>Handbook of Biological Psychiatry</i> (1981)	47
Hollister, <i>Psychopharmacology</i> , in <i>Schizophrenia: Science and Practice</i> (J. Shershow ed. 1978)	48
L. Hollister, <i>Clinical Pharmacology of Psychotherapeutic Drugs</i> (1978)	46
G. Honigfeld & A. Howard, <i>Psychiatric Drugs</i> (2d ed. 1978)	46, 47
R. Julien, <i>A Primer of Drug Action</i> (1975)	46

Table of Authorities Continued

	Page
Levitt & Krikstone, <i>The Tranquilizers</i> , in <i>Psychopharmacology: A Biological Approach</i> (R. Levitt ed. 1975)	43
J. Neale & T. Oltmanns, <i>Schizophrenia</i> (1980)	43, 45
<i>Physicians' Desk Reference</i> (38th ed. 1984)	10
MISCELLANEOUS:	
ABA Standards, <i>Compilation</i> (1974)	23
ABA Standards <i>Relating to the Administration of Criminal Justice, Providing Defense Services</i> (1968) ..	22
F. Bailey & H. Rothblatt, <i>Fundamentals of Criminal Advocacy</i> (1974)	48
F. Bailey & H. Rothblatt, <i>Investigation and Preparation of Criminal Cases</i> (1970)	20, 31
Bonnie, <i>Psychiatry and the Death Penalty: Emerging Problems in Virginia</i> , 66 Va. L. Rev. 167 (1980) .	40
E. Borchard, <i>Convicting the Innocent</i> (1932)	22
Brennan, <i>Law and Psychiatry Must Join in Defending Mentally Ill Criminals</i> , 49 A.B.A.J. 239 (1963) ..	31
<i>Brief for the State of Oregon as Amicus Curiae, Gideon v. Wainwright</i> , No. 155, O.T. 1962	35
Comment, <i>Madness and Medicine: The Forcible Administration of Psychotropic Drugs</i> , 1980 Wisc. L. Rev. 497	45
109 Cong. Rec. 14224 (1963)	23
110 Cong. Rec. 445, 18521 (1964)	23
<i>Criminal Defense Techniques</i> (S. Bernstein ed. 1983) .	48
<i>Criminal Justice Act: Hearings on H.R. 1027 Before Subcomm. No. 5 of the House Comm. on the Judiciary</i> , 88th Cong., 1st Sess. (1963)	23
<i>Daily Oklahoman</i> , June 27, 1980	13
D. Danner, <i>Expert Witness Checklists</i> (1983)	20, 21
Decker, <i>Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents</i> , 51 U. Cinn. L. Rev. 574 (1982)	25

Table of Authorities Continued

	Page
Diamond & Louisell, <i>The Psychiatrist as an Expert Witness: Some Ruminations and Speculations</i> , 63 Mich. L. Rev. 1335 (1965)	30
J. Frank, <i>Not Guilty</i> (1957)	22
Goldstein & Fine, <i>The Indigent Accused, the Psychiatrist, and the Insanity Defense</i> , 110 U. Pa. L. Rev. 1061 (1962)	31
I. Goldstein & F. Lane, 2 <i>Goldstein Trial Techniques</i> (2d ed. 1969)	19, 20, 21
Liebman & Shepard, <i>Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor</i> , 66 Georgetown L. J. 757 (1978)	39
Note, <i>Right to Aid in Addition to Counsel for Indigent Criminal Defendants</i> , 47 Minn. L. Rev. 1054 (1963)	22, 25
Note, <i>Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection</i> , 59 Wash. U.L.Q. 317 (1981)	25
Note, <i>The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards</i> , 24 Hastings L. J. 647 (1973)	25
Note, <i>The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings</i> , 55 Cornell L. Rev. 632 (1970) .	21, 22, 25
D. Phillips, <i>The Great Texas Murder Trials</i> (1979) ...	5
Plotkin, <i>Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment</i> , 72 Nw. U. L. Rev. 461 (1977)	43
R. Roesch & S. Golding, <i>Competency to Stand Trial</i> (1980)	43
Scrignar, <i>Tranquilizers and the Psychotic Defendant</i> , 53 A.B.A. J. 43 (1967)	43
M. Vonnegut, <i>The Eden Express</i> (1975)	45
Winick, <i>Psychotropic Medication and Competence to Stand Trial</i> , 3 Am. Bar. Foundation Research J. 769 (1977)	43, 45, 46

BRIEF FOR THE PETITIONER

DECISIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 663 P.2d 1, and is reproduced in the Joint Appendix at J.A. 66. The Judgment and Sentence of the trial court are reproduced at J.A. 62.

JURISDICTION

The Judgment of the Oklahoma Court of Criminal Appeals was entered on April 12, 1983. A timely petition for rehearing was filed and was denied on June 15, 1983. J.A. 82. On August 12, 1983, Justice White entered an order extending petitioner's time to file a petition for a writ of certiorari until September 13, 1983. The petition was filed on September 13, 1983, and was granted on March 19, 1984. J.A. 83. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution and of the laws of Oklahoma are set forth in the Appendix, *infra*.

STATEMENT OF THE CASE

1. In October, 1979, petitioner Glen B. Ake (pronounced "ache") was twenty-four years old. He was married and employed as an oil driller. His entire prior criminal record consisted of a 1975 conviction for unauthorized use of a motor vehicle. Report of the Trial Judge, at 1, 5.

On October 15, after a day of heavy drinking and drug use, PX 68 at 1-2, 5-6; Tr. 546, 549,¹ Ake and another man entered the home of the Reverend Richard Douglass in Canadian County, Oklahoma. Rev. Douglass, his wife and their two children

¹ "Tr. ____" indicates references to the trial transcript.

were at home. Ake bound, gagged and shot the members of the Douglass family, killing Rev. and Mrs. Douglass.

These killings were undeniably tragic, and if committed by a person in his right mind, heinous. But Ake's defense—and the only seriously contested factual issue at trial—was that he was legally insane at the time. The question in this Court is whether the State of Oklahoma determined that he was not insane, and that he should be put to death, in a constitutionally acceptable manner.

2. Ake was arrested in Colorado in November 1979 and was returned to Oklahoma. After preliminary proceedings, he was arraigned on February 14, 1980, in the District Court for Canadian County. The court found his behavior at arraignment and in other incidents at the jail to be so "bizarre," J.A. 2, that it *sua sponte* ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as to . . . whether the Defendant may need an extended period of mental observation." *Id.*²

Ake was examined by William L. Allan, a psychiatrist appointed by the court, on February 22, 1980. Dr. Allan noted that "[a]t times he appears to be frankly delusional. . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." J.A. 8. Dr. Allan diagnosed probable paranoid schizophrenia and recommended a "more prolonged psychiatric evaluation" to determine Ake's competency to stand trial. J.A. 9. On March 5, Ake was ordered committed to Eastern State Hospital at Vinita. J.A. 2. Pursuant to statute and the court's order, he was examined only with respect to his "present sanity," *i.e.*, his competence to stand trial. *Id.*; Okla. Stat. tit. 22, § 1171 (1971), App. 6a.

On April 1, 1980, Dr. P. D. Garcia, the Chief Forensic Psychiatrist at Eastern State hospital, reported to the court that

² The arraignment was recorded by a court reporter, but her notes were never transcribed and she no longer resides in Oklahoma. Counsel for both parties are attempting to obtain a transcript.

Ake was not competent to stand trial. J.A. 10. The court held a special hearing on April 10 to determine Ake's competency. Dr. Allan, who had consulted with Dr. Garcia, testified:

[Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis, that he is dangerous.

J.A. 11. Dr. Allan recommended that:

because of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—the State Psychiatric Hospital system.

J.A. 12. When asked whether Ake could currently tell right from wrong, Dr. Allan responded that he could not:

Q. [by the Court]: [D]o you have an opinion as to whether Mr. Ake at this time understands the significance or the difference between right and wrong?

A. At this time?

Q. At this time?

A. I have to give a qualified opinion because—uh—all of his statements are co[u]ched in terms of his religious beliefs which are delusional and his concept of right and wrong does not accept the Court's authority of government.

Q. I see.

A. So, he just doesn't accept what the rest of us live by.

...

Q. [D]o I interpret your answer to say that in terms of society's judgment as between right and wrong, whatever things he may have are not on that level but are somewhat different?

A. Yes. His wor[l]d would be a different dimension. He does not, as I understand it, accept the ordinary rules of right and wrong.

J.A. 13-14. Neither Dr. Allan nor Dr. Jack Enos, a non-psychiatrist M.D. who also testified that Ake was mentally ill

and dangerous, *see* Tr. of Mental Health Hearing at 24-25, was asked anything about Ake's mental condition at the time of the offense.

The court found Ake to be "a mentally ill person in need of care and treatment" and ordered him re-committed to the State mental hospital. J.A. 15. Pursuant to statute, all criminal proceedings were suspended. Okla. Stat. tit. 22 § 1171 (1971), App. 6a.

Six weeks later, Dr. Garcia reported to the court that Ake had become competent to stand trial. He noted that Ake was being maintained on 200 milligram doses of Thorazine administered three times daily, and recommended that this dosage be continued. J.A. 16. Without further inquiry, the criminal proceedings against Ake were ordered resumed. J.A. 3.

3. A pre-trial conference was held on June 13, 1980. Ake's court-appointed counsel informed the court that in order to prepare an adequate insanity defense, he needed the assistance of a psychiatrist to examine Ake with respect to his mental condition at the time of the offense. J.A. 17. During Ake's three-month stay at the State hospital, no such examination had been performed. Counsel urged that, in view of petitioner's indigency,

the court can award us money to prepare a proper defense. And, at this time I am going to ask the court to grant us a reasonable amount of funds [with] which to pay [a] psychiatrist . . .

J.A. 17. The Judge expressed doubt that he had the authority under State law to grant the request, J.A. 17, 18, but counsel argued that the court was required to do so under the federal Constitution:

Glen Ake, indigent [with] court-appointed counsel; still under the constitution is entitled to monies for a psychia-

trist as if he were another Cullin Davis who had the money to pay for it.³

. . .

To deny to this client the . . . funds for the preparations would be a miscarriage of justice . . . because an attorney has got to have, as the court knows, funds to properly defend his client. And, in a Murder One case, I hear the word "expense," and I cannot possibly believe that in anybody's heart a few meager dollars is going to stand between a man charged with Murder in the First Degree, of insuring him of a constitutional, fair and impartial trial, and being [un]prepared because of a few dollars that they think might be spent of the taxpayers' money.

J.A. 17, 19.

The motion was denied.⁴ The court agreed that the defendant was entitled to a psychiatric examination, if he could afford it, J.A. 3-4, 21, but felt bound by State law that, in the court's own words, was "almost crippling restrictive" with respect to providing funds for defense expenses. J.A. 20. The Court rejected petitioner's federal constitutional claim on the authority of *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), "in which the U.S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants." *Id.* Nevertheless, recognizing the relevancy and materiality of the requested psychiatric examination to Ake's insanity defense, the court ruled that counsel could "have the defendant available, if you are able to arrange [the psychiatric examination] in some other manner." J.A. 21.

³ T. Cullin Davis is a Texas millionaire who was charged with the murder of his step-daughter and acquitted by a jury. *See* D. Phillips, *The Great Texas Murder Trials* (1979).

⁴ Anticipating the denial of his motion for a defense expert, counsel requested, as a fall-back alternative, an examination with respect to Ake's sanity at the time of the crime by a neutral, court-appointed psychiatrist. J.A. 18. This request was also denied.

4. Jury selection for Ake's trial began on June 23, 1980. Tr. 25. On June 24 and 25, the State put on twenty-three witnesses to prove the virtually uncontested fact that Ake had committed the homicides in question. Tr. 279-550. The entire defense case—and the entirety of the evidence on petitioner's insanity defense—was presented to the jury between 11:05 a.m. and 2:15 p.m. on June 25, with a recess for lunch in the middle. Tr. 552-609, 571.

The defense called three witnesses: Dr. Allan, Dr. Enos, and Dr. Garcia. Each testified that Ake was mentally ill, but none was able to express an opinion about Ake's sanity at the time of the offense because none had examined him for that purpose. The prosecution repeatedly called to the jury's attention the fact that the doctors could not testify about Ake's condition at the time of the offense, thereby fueling the unwarranted inference that his insanity defense was without merit. The prosecution pressed each witness to admit that he had not performed or seen the results of any examination diagnosing Ake's mental state in October 1979—the very examinations Ake had requested and the State had denied.

Thus, Dr. Allan testified that when he examined Ake, in February and April, Ake had been mentally ill and "very dangerous." J.A. 35, 36, 37. He testified that, at those times, Ake thought he was "literally the sword of vengeance," J.A. 34, and "really didn't accept the authority of any earthling, court, or government, or person." J.A. 39. Dr. Allan testified that Ake's illness might have been present since the age of seven. J.A. 35, 38. But on cross-examination by the District Attorney, he admitted that he had no opinion about whether Ake knew right from wrong on October 15, 1979:

Q. Doctor, your test at the time of your interview . . . was your test to ascertain whether he knew right from wrong?

A. No, it was not.

Q. It was whether he had a mental illness, is that correct?

A. Yeah, . . . in neither case did I specifically go into detail, try to get answers as to his ability to know right from wrong at the time of the alleged act.

Q. So, that was not your concern, is that correct?

A. That's right.

J.A. 37-38.

Dr. Enos testified that in his opinion Ake was a paranoid schizophrenic, J.A. 42, who, at the time of his interview with Enos in April, communicated only with God. J.A. 41. On cross-examination, he, too, readily conceded that his examination and opinion did not relate to Ake's mental state in October 1979:

Q. Then your examinations, or your conclusions are not whether he knew right from wrong?

A. No.

Q. And, certainly wouldn't relate to the months of October—

A. Not at all.

Q. —or November 1979, as to whether he knew right from wrong?

A. That's correct.

. . .

Q. Is there any place, in any report you have ever seen, or anything you have had the benefit to review, that has said "this defendant was legally insane in October or November of 1979?"

A. No, sir.

Q. Do you have any opinion as to whether—

A. No, sir.

J.A. 46.

The final defense witness was Dr. R. D. Garcia, Chief Forensic Psychiatrist at Eastern State Hospital, where Ake had been a patient for three months. J.A. 47. Dr. Garcia agreed

with the diagnosis of Drs. Allan and Enos that Ake was mentally ill with "schizophrenia, paranoid type." He testified that Ake's symptoms were full-blown "paranoid delusions, hallucinations, and so forth, and so on." J.A. 49.

Dr. Garcia testified that while at Eastern State Hospital, Ake had been carefully evaluated and had been subjected to a broad range of physiological and psychological tests. J.A. 48, 50.⁵ But Ake had never been examined or evaluated with respect to his mental condition at the time of the charged offenses. J.A. 53. On cross-examination, the District Attorney repeatedly drove home the fact that Dr. Garcia, like the other medical witnesses, was unable to express any opinion about Ake's sanity the previous October:

- Q. For what purpose did you receive [Ake]?
 A. For the purpose of psychiatric determination, or observation and testing, in order to determine whether he was insane, or not.
 Q. Incompetent to aid in his defense?
 A. Yes, sir.
 Q. Okay. Not legally insane as knowing right from wrong, but just incompetent to aid in his defense, is that correct?
 A. Yes, sir.
 Q. Was there any call at that time for a diagnosis as to October or November 1979? Were you looking into that?
 A. No, sir . . .
 Q. Have you done any testing or evaluation of Glen Burton Ake as towards legal insanity at the time of the commission of the offense?
 A. No, sir, we were not able to.

⁵ Dr. Garcia testified that the results of these tests and clinical observations had ruled out the possibility that Ake was malingering or faking mental illness. J.A. 48, 51.

Q. Do you have any opinion as to Glen Burton Ake's mental insanity at the time of the offense—October or November?

A. No, I would not say . . .

. . .

Q. Doctor, did you do any tests to determine whether the person that is seated here, Glen Burton Ake, was mentally insane at the time of this incident?

A. No, sir, we were not able to—

Q. Okay. You have no opinion.

A. —make any examination.

Q. And, you have no opinion as to that, is that true?

A. No, sir.

J.A. 52-53.

Indeed, the prosecuting attorneys believed that they had shown so clearly that the doctors' testimony was irrelevant to the issue before the jury that they moved to have their testimony stricken from the record. J.A. 39, 54.

The defense then rested. The defendant did not testify. As his counsel explained at the bench,

[D]ue to the uncooperative nature of the defendant, and the lack of communication . . . defense counsel at this time is unable to put the defendant on the witness stand, or to determine whether or not he in fact wants to execute [*sic*] his Constitutional right to testify in his behalf . . . We cannot get a yes or no if he wants to take the stand, so we rest.

J.A. 54-55. Even the prosecution was taken aback at the brevity of the defense case:

MR. GOERKE: (Out of the hearing of the jury) Based upon that only? Based upon that only, you rest?

MR. BREWER: (Out of hearing of the jury) Yes, sir.

J.A. 55. The State put on no evidence in rebuttal. Tr. 611.

5. During his trial, Ake was involuntarily sedated with 200 milligrams of Thorazine, administered three times a day. J.A. 49, 52. "Thorazine is a major tranquilizer used in people who are psychotic, as opposed to neurotic." J.A. 41 (testimony of Dr. Enos).⁶ A normal person would become "extremely drowsy" on a single daily dose of that size, and "three times as drowsy" on the dose administered to Ake. J.A. 42. Ake "remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings." *Ake v. State*, 663 P.2d at 6, J.A. 71.

Defense counsel repeatedly protested this situation during the trial, calling the court's attention to the fact that they were utterly unable to communicate with their client. For example, when the court was about to hear testimony in chambers on the admissibility of Ake's post-arrest statement, defense counsel were asked if they wished the defendant to be present. They replied:

MR. BREWER: We waive presence of our—he ain't going to talk to us anyway. He doesn't know what is going on. He is goofier than hell. We don't need him, and he can't assist us. We have already told the Court that he doesn't possess the ability to aid and assist in a jury trial. Has he ever talked to you, Mr. Strubhar?

MR. STRUBHAR: No.

MR. BREWER: He has never even talked to me. Never said hello.

J.A. 27. And see J.A. 54-55, 26 ("while he takes this tranquilizer, he becomes a zombie") (remarks of defense counsel), Tr. 501. Even the trial judge agreed that "we have had all along a real question as to whether the man had any kind of mental capacity." Tr. 495.

6. At the close of the evidence in the criminal responsibility phase of the trial, the judge charged the jury, in accordance with Oklahoma law, that the defendant could be found not

⁶ Thorazine is the registered trademark for a brand of chlorpromazine manufactured by Smith Kline & French Laboratories. See *Physicians' Desk Reference* 1896 (38th ed. 1984).

guilty by reason of insanity only if he did not have the ability to distinguish right from wrong at the time of the alleged offense. J.A. 57. The jury was instructed that Ake was to be presumed to have been sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time; if he raised such a doubt, the burden would shift to the State to prove, beyond a reasonable doubt, that he had been sane. J.A. 57-58; see *Ake v. State*, 663 P.2d at 10, J.A. 78.

In his closing argument, the District Attorney argued to the jury that the psychiatrists' inability to express an opinion about Ake's sanity at the time of the offense proved that no reasonable doubt as to his sanity existed:

Do you remember my persistence in asking, for instance, Dr. Allan, "Do you have an opinion as to whether he knew right from wrong at the time—during October and November of 1979?" "No." The same question was asked of Dr. Garcia. The same question was asked of Dr. Enos. None had an opinion as to whether he knew right from wrong in October or November of 1979.

So, bearing in mind we are looking at a test of knowing right from wrong on October 15, 1979 . . . realizing the consequences of those acts, is there a probable—a reasonable doubt created? None of the doctors had any opinion. Remember? Each one was distinctly asked, "Do you have any opinion as to whether the defendant knew right from wrong in October and November, 1979?" None of them did.

J.A. 55.⁷

The Jury rejected Ake's insanity defense and returned a verdict of guilty on all counts.

⁷ The District Attorney also implied to the jury that Ake would go free if he were found not guilty by reason of insanity:

Mr. Brewer says, "That won't happen. They won't just turn him loose." The Judge has taken care of that in Instruction 12A—read that. Send him to a mental institution—well, we have been there. They sent him April 10th. They sent him back June 9th, and said he is still mentally ill, but he is ready to go back. He

7. The sentencing stage of Ake's trial began late that same afternoon. It did not last long. Neither the State nor the defense put in any new evidence. Both sides rested on the evidence previously presented. Tr. 703-04.

In urging the jury to return the death penalty, the prosecution explicitly relied on the testimony of the psychiatrists to establish an aggravating circumstance, namely that "there is a high probability that [Ake] would again commit criminal acts of violence." Tr. 717. The State reminded the jury of "the testimony of the three psychiatrists who have evaluated Glen Ake's mental illness, and say he is dangerous to society"; "each one . . . stated, this defendant, Glen Burton Ake, is dangerous, he is volatile." Tr. 716, 714 (closing argument); *see* J.A. 37, Tr. 601 (doctors' testimony).

Petitioner had no expert witness to rebut this testimony. Moreover, his counsel was deprived of the expert psychiatric assistance necessary to develop and present mitigating evidence, such as Ake's mental state at the time of the offense, or the psychological effects of the child abuse Ake had suffered at the hands of his father (*see* Tr. 559). Again, the cause of this limitation of the available psychiatric evidence was the State's refusal to provide the defense with funds to obtain a psychological examination on these matters, combined with the State law that restricted the scope of the examination conducted by the State and court-appointed psychiatrists to the question of competency to stand trial.

The jury found three aggravating circumstances, including the likelihood that Ake would commit future acts of violence,

is sedated. If we hadn't had these charges pending, he would have gone out on the street a free man.

MR. BREWER: I'll object to that, if the Court please.

THE COURT: Overruled.

MR. GOERKE: If the charges hadn't been pending on June 9th he would have gone back out on the street.

J.A. 56.

J.A. 60.⁸ The jury fixed Ake's punishment at death for each of the two murder counts, and at 500 years imprisonment for each of the two counts of shooting with intent to kill. J.A. 61, Tr. 696-97.⁹

On July 25, 1980, the trial court denied Ake's motion for a new trial and sentenced him, in conformity with the jury's verdicts, to death by lethal injection. J.A. 63.

8. On appeal to the Oklahoma Court of Criminal Appeals, Ake contended that "he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist . . . as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses." *Ake v. State*, 663 P.2d at 6, J.A. 71. The court disagreed:

We have held numerous times that the unique nature of capital crimes notwithstanding, the State does not have

⁸ The other aggravating circumstances found were that the crime was committed to avoid arrest and that the murders were especially cruel, heinous and atrocious. J.A. 60.

⁹ As the sentencing phase of the trial began, the courthouse air conditioning broke down. Tr. 698. The temperature outside was 104° Fahrenheit. (Datum from U.S. Dep't of Commerce, National Climatic Data Center.) When the jurors retired into the windowless jury room during a brief chambers conference, they sent a note to the court after a few minutes asking to be allowed to return to the courtroom because the jury room was insufferably hot. Tr. 708. Counsel noted "they may be ready to pass out," and "I'm about to die myself." Tr. 706. The court agreed that "[i]t is unbearable in here." Tr. 711. The court suggested to the jurors that they recess for supper and then spend the night sequestered at a motel. *Id.* But to avoid being sequestered overnight, the jurors chose instead to conclude the trial. Tr. 712. After closing arguments, the jury was returned to the same stifling jury room to decide upon the life or death of the defendant. The verdict of death was returned forty minutes later. *Daily Oklahoman*, June 27, 1980, at 1.

the responsibility of providing such services to indigents charged with capital crimes.

Id. The court found that Ake had "failed to establish any reasonable doubt as to his sanity at the time the crimes were committed," *id.* at 10, J.A. 78, but ignored the fact that his attempt to do so was thwarted by the State's refusal to have him examined on that issue by even a single psychiatrist or psychologist.

The court emphasized, as had the prosecution at trial, the inability of any of the doctors who testified to give "an opinion as to [Ake's] ability to distinguish between right and wrong at the time of the shootings." *Id.* Yet this failure of evidence resulted solely from petitioner's indigency: Oklahoma refused to appoint a psychiatrist to evaluate Ake's mental condition at the time of the offense and he lacked the funds to retain one.¹⁰

Petitioner also contended on appeal that the Thorazine he was given during his trial rendered him unable to understand the proceedings against him or to assist counsel with his defense. He also complained that his drugged and "hypnotic" state prejudiced him in the eyes of the jury. Brief of Appellant at 18-23. The Court of Criminal Appeals rejected these arguments, relying on Dr. Garcia's May 22 letter which stated that

¹⁰ The court did not explain how it could conclude that Ake had not raised even a reasonable doubt about his sanity when he had been adjudged incompetent to stand trial after "bizarre" behavior at arraignment, when three doctors had testified that he was a paranoid schizophrenic, when Dr. Allan had testified that his mental illness might extend back to his childhood and therefore could have been "apparent" on the day of the offense, J.A. 38, and when the State's Chief Forensic Psychiatrist had testified, in answer to a hypothetical question, that a person in Ake's condition at the time of the offense might not have been able to tell right from wrong, J.A. 54.

Of course, if the Court of Criminal Appeals had concluded that Ake had raised a reasonable doubt about his sanity, it would have been obliged to reverse his conviction, since the State had not put on evidence that could establish his sanity beyond a reasonable doubt.

under the influence of Thorazine Ake was competent to stand trial, and on the supposed absence of evidence "that any change in his competency occurred in the month between his release from Vinita [hospital] and his trial." 663 P.2d at 7, J.A. 72. The Court could not ignore the fact that Ake "stared vacantly ahead throughout the trial," *id.* at 7 n.5, J.A. 73, but it refused to concede any possibility that the Thorazine was responsible. Rather, the court conjectured, Ake's behavior might have been "simulated to delay justice," *id.* at 8, J.A. 74:

It is quite possible that the defense of insanity interposed by the appellant fostered such behavior on his part.

Id. at 7 n.4, J.A. 72. But there is absolutely no basis in the record for such an insinuation. To the contrary, the State's own Chief Forensic Psychiatrist testified that a series of sensitive psychological tests and clinical observations had unequivocally ruled out the possibility that Ake's mental illness was feigned. J.A. 48, 51.

Ake's other allegations of error were similarly rejected, and the judgments of guilt and the sentences of death were affirmed. 663 P.2d at 12, J.A. 81. This Court granted Ake's motion for leave to proceed *in forma pauperis* and his petition for a writ of certiorari. J.A. 83.

SUMMARY OF ARGUMENT

1. A defendant's right to a fair criminal trial is guaranteed against the States by the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45 (1932). To secure a fair trial, indigent defendants must be provided with the assistance that is essential to the "proper functioning of the adversarial process." *Strickland v. Washington*, No. 82-1554, slip op. at 16 (U.S. May 14, 1984). This Court has previously recognized that such necessary assistance includes counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the transcripts of prior proceedings, *Griffin v. Illinois*, 351 U.S. 12 (1956).

In a proper case, the assistance of an expert is equally fundamental and essential. When a case involves disputed

factual issues of a sort that lay people do not have the knowledge, training or experience to understand fully without expert assistance, it is fundamentally unfair to put a defendant on trial without assuring that he and his counsel have the means to prepare and present those issues to the factfinder intelligibly and upon fairly adversary terms. The provision of such assistance is also required to fulfill the law's promise that justice not be reserved for the wealthy. *Griffin v. Illinois*, *supra*.

In this case, the assistance of a psychiatrist or psychologist was manifestly necessary. Glen Ake's only defense to a capital charge was that he had been insane at the time of the alleged offense. It was beyond dispute that he was severely mentally ill. He had been adjudged incompetent to stand trial, and had been committed to the State mental hospital for three months between arraignment and trial. In this case, the assistance of a qualified mental health professional was as essential as the assistance of an attorney to a real test—a "trial" in the original meaning of the word—of the merits of his insanity defense. Ake was therefore denied a fair trial by the State's refusal to provide him with any expert assistance.

The federal government and a large majority of the States have acknowledged their responsibility to provide expert assistance to indigent criminal defendants in appropriate cases. But Oklahoma acknowledges no such responsibility. This Court should confirm that in proper cases the provision of such assistance is required by the Constitution.

2. In a capital case, the sentencing proceeding closely resembles a trial, and, like a trial, it must be a truly adversary proceeding. *Strickland v. Washington*, *supra*. Where expert assistance is required to make it so, the State must make such assistance available to indigent defendants for the reasons given above.

Moreover, where the State seeks to impose the penalty of death, it "is essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Barefoot v. Estelle*, 103 S.Ct.

3383, 3396 (1983). It is universally recognized that mental illness and its effects are mitigating circumstances that may move a jury to forego the death penalty. Refusing to provide an indigent defendant facing the death penalty with the means of presenting such information to the jury in a credible and intelligible manner makes it likely that he will be condemned to death *erroneously*—i.e., where a fully informed jury would not impose the death penalty.

The refusal to provide such assistance is even more egregious where, as here, the State relies on expert testimony to establish the aggravating circumstance of predictable future dangerousness, but the defendant is precluded by his poverty from rebutting that testimony with equally authoritative expert witnesses. Such a heavy thumb on the scales of justice—with a human life literally in the balance—cannot meet the standards of due process and equal protection.

3. Due process also precludes the trial of a person who cannot understand and participate intelligently in the proceedings against him. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). A court is required to make inquiry when a defendant's behavior or appearance raises a serious question of competency. *Id.* No inquiry was made here, although the judge himself acknowledged that the defendant's competency was doubtful. Tr. 495. This requires reversal.

Reversal is also required because, on this record, it is plain that the Thorazine being administered to the defendant rendered him so sedated or uninvolved in his surroundings that he was virtually absent from his own trial. And his drugged, "zombie"-like appearance and demeanor surely prejudiced him in the eyes of the jurors who held his fate in their hands.

ARGUMENT

I. WHEN AN INDIGENT DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY IN ISSUE, THE STATE MAY NOT DENY HIM THE MEANS TO ESTABLISH HIS INSANITY DEFENSE

In this case, an indigent defendant displaying obvious signs of severe and possibly long-standing mental illness at arraignment and at trial was denied *any* psychiatric examination directed to his sanity at the time of the crime. His entire defense case, the closing arguments of counsel, the jury's guilty verdict, the sentencing hearing and the jury's sentence of death took less than one trial day. Tr. 553-740. Such a proceeding does not comport with the guarantees of the United States Constitution.

The Oklahoma courts believed their procedures to be adequate under the rule of *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953). But *Baldi* did not approve such a complete denial of access to expert services; indeed, the decision relies upon the fact that a psychiatric examination *was* provided in that case. See 344 U.S. at 568. To the extent, if any, that *Baldi* stands for the proposition that a defendant can never have a constitutional right to expert assistance at State expense, it is inconsistent with the subsequent rulings of this Court and with the constitutional requirement of fundamental fairness in criminal trials, and should be overruled.

A. The Constitution Requires That Indigent Defendants Be Provided With Reasonably Necessary Expert Assistance.

This Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion). For this reason, the provision of assistance to indigent criminal defendants that is "'fundamental and essential to a fair trial' is made obligatory upon the States" by the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

In a proper case, expert assistance is fundamental and essential to a fair trial. In such a case, the Constitution requires the States to make necessary expert assistance available to indigent criminal defendants.

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court hypothesized "the extreme case of a prisoner charged with a capital offense, who is deaf and dumb [and] illiterate . . . prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result . . . would be little short of judicial murder." *Id.* at 72. The situation would be no different if counsel was appointed, but was not provided with the means—for example, a sign-language interpreter—by which to communicate with his client.

The same reasoning applies where the assistance of an expert is necessary to discover, analyze, and present to the judge or jury facts that are matters of specialized knowledge, or to explain facts, the significance of which will not otherwise be apparent to the lay person. "An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge." Fed. R. Evid. 702 advisory committee note. Even fifty-five years ago, it was

a matter of common knowledge, that upon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.

Reilly v. Barry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) (Cardozo, C.J.). Trial lawyers therefore understand that "[m]odern civilization, with its complexities of business, science and the professions, has made expert and opinion evidence a necessity." 2 I. Goldstein & F. Lane, *Goldstein Trial Techniques* § 14.01 (2d ed. 1969).

The fact that a government expert may have examined the defendant or the evidence does not satisfy the defendant's need

for expert assistance. In the first place, an independent expert may come to a different conclusion. See n. 12, *infra*; cf. *Watson v. Cameron*, 312 F.2d 878 (D.C. Cir. 1962) (persons confined in public mental hospital entitled to examination by outside expert) (Burger, J.). But the defendant's need for an expert is not based only on that possibility, important as it is. An expert serves many crucial purposes in litigation other than testifying at trial. At the very outset of a case, an expert may be necessary to evaluate the facts and lay a groundwork for future investigation and trial strategy. "[I]t may be impossible to properly conduct such an evaluation without expert assistance." D. Danner, *Expert Witness Checklists* 72 (1983). In a criminal case, such an evaluation may be essential in making an intelligent decision about whether to pursue or abandon certain lines of defense, or even in deciding whether to go to trial or to seek to negotiate a plea bargain. If the case goes forward, "counsel often needs an expert for assistance in becoming an expert in the field [himself], and then to understand the intricacies of the case sufficiently to try it successfully." *Id.* at 2. In helping the attorney prepare for trial, an expert will "advise counsel about the facts and theories that counsel may face from the opposing side." *Id.* at 41. She may be able to refer counsel to relevant studies and data not otherwise available to him, *id.* at 74, and can assist in preparing for the examination of witnesses—especially the cross-examination of the other party's experts. *Id.* at 72, 292. Indeed, one authority advises that it may be best not to cross-examine opposing experts at all when counsel "has failed to become somewhat of an expert on the subject himself by prior preparation, study and consultation with his own expert witnesses." *Goldstein Trial Techniques*, *supra*, at § 14.24.

Of course, the expert's role at the trial itself is also crucial. "Testimony emanating from the depth and scope of specialized knowledge is very impressive to the jury. The same testimony from another source can have less effect." F. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* 116 (1970). Thus, if "used properly, an expert may be the most

important tool to counsel in preparing the case for trial." D. Danner, *supra*, at 71-72 (emphasis added).

Denying an indigent defendant access to necessary expert assistance not only harms the defendant, but undermines the integrity of the truthfinding process and the reliability of the verdict. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). The effective functioning of a true adversarial process is protected by the Sixth Amendment's guarantee of effective assistance of counsel. *United States v. Cronin*, No. 82-660, slip op. at 8 (U.S. May 14, 1984). "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 8-9.¹¹

But the right to an effective counsel "is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires." *Bush v. McCollum*, 231 F. Supp. 560, 565 (N.D.

¹¹ In addition to the guarantee of effective assistance of counsel, two other clauses of the Sixth Amendment presuppose the existence of a functioning adversary system: The defendant's rights "to be confronted by the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Like the right to assistance of counsel, these rights cannot be *effectively* implemented without providing necessary collateral services to indigent defendants. Without expert assistance and advice, the value of cross-examination in a case involving specialized testimony is questionable. *Goldstein Trial Techniques*, *supra*, at § 14.24. And without the funds to retain necessary experts, a defendant's right to compulsory process is reduced to "the shadow of the right . . . deprived of the substance." *People v. Watson*, 36 Ill. 2d 228, 233, 221 N.E.2d 645, 648 (1966) (holding the availability of compensated expert witnesses for indigent defendants to be constitutionally required). See generally Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 641-43 (1970).

Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965). This proposition is not just a matter of logic. In practice, the "inability to finance these [expert] expenses has led, with some frequency, to convictions later found to be erroneous." Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 Minn. L. Rev. 1054, 1060 (1963) (citing E. Borchard, *Convicting the Innocent* (1932) and J. Frank, *Not Guilty* (1957)).¹²

The legal profession has recognized that the proper functioning of the adversary system

rests on certain basic assumptions: *first*, that an accused person is presumed innocent; *second*, that guilt must be established in an adversary proceeding . . .; and *third*, that the two adversaries may be aided by advocates capable of rendering *effective* assistance to the cause.

ABA Standards Relating to the Administration of Criminal Justice, Providing Defense Services, at 141 (1968) (final emphasis added). The third assumption, of effective representation, implies certain responsibilities:

[f]or the representation provided to be effective, defense counsel must be provided with adequate resources for investigation and the employment of experts to assist in preparation of the case.

Id. at 143 (emphasis added). Thus the ABA Standards would require the government to "provide for investigatory, expert

¹² For example, in one murder case, state police fingerprint experts testified that a latent print lifted from the crime scene was defendant's. Court-appointed defense counsel was able to procure his own expert, who proved that the print was not the defendant's by showing three crucial points of dissimilarity. An acquittal followed. See Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 638 n.38 (1970).

and other services necessary to an adequate defense." *Id.* § 1.5.¹³

Congress has acknowledged the constitutional mandate to provide indigent criminal defendants with necessary expert assistance, and it has responded to that mandate. The Criminal Justice Act, 18 U.S.C. § 3006A (1983), was "designed to implement the sixth amendment guarantee of the assistance of counsel." *Proffitt v. United States*, 582 F.2d 854, 857 (4th Cir. 1978), *cert. denied*, 447 U.S. 910 (1980); see 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14224 (1963). Subsection (e) of that Act, 18 U.S.C. § 3006A(e), provides for the appointment and payment of experts "necessary to an adequate defense." Testifying in support of the proposed Act, the President of the American Bar Association underscored the vital nature of this provision:

Even though [defense counsel] were zealous in performing their legal duties, without investigative services, when the assigned lawyer is met with all the prepared forces of the Government prosecution, they cannot meet it adequately.

Criminal Justice Act: Hearings on H.R. 1027 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 126 (1963) (testimony of Sylvester C. Smith, Jr.). In presenting the conference committee report on the bill, Senator Hruska indicated Congress' agreement:

An adequate representation commonly entails more than the mere presence of a lawyer in court. To prepare his defense, he may need investigative, expert, or other services.

110 Cong. Rec. 18521 (1964).

Cognizant of the fact that expert assistance may be essential to the fair trial of some cases, eight of the United States Courts

¹³ Then Circuit Judge Burger was Chairman of the ABA Advisory Committee that proposed this standard and prepared the accompanying statement. See *ABA Standards, Compilation* at 481 (1974).

of Appeals¹⁴ and at least eighteen States¹⁵ have recognized the constitutional necessity of providing expert assistance for indigent criminal defendants in proper cases. The scholarly com-

¹⁴ See *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980); *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967); *Matlock v. Rose*, 731 F.2d 1236, 1243-44 (6th Cir. 1984); *United States ex rel. Robinson v. Pate*, 345 F.2d 691 (7th Cir. 1965), *aff'd in part and remanded in part on other grounds*, 383 U.S. 375 (1966); *Ray v. United States*, 367 F.2d 258, 264 (8th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967); *Mason v. Arizona*, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975); *Burger v. Zant*, 718 F.2d 979, 981 (11th Cir. 1983), *vacated and remanded on other grounds*, 52 U.S.L.W. 3860 (U.S. May 29, 1984); *United States v. Decoster*, 624 F.2d 196, 210 (plurality), 277-79 & n.80 (dissent) (D.C. Cir. 1976) (en banc). Cf. *Christian v. United States*, 398 F.2d 517, 519 n.7 (10th Cir. 1968) (such a right may exist). And see *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting), *vacated and remanded*, 352 U.S. 565 (1957).

¹⁵ See *People v. Worthy*, 109 Cal. App. 3rd 514, 167 Cal. Rptr. 402 (1980); *State v. Clemons*, 168 Conn. 395, 363 A.2d 33, 38, *cert. denied*, 423 U.S. 855 (1975) (semble); *Pierce v. State*, 251 Ga. 590, 308 S.E.2d 367 (1983); *State v. Olin*, 103 Idaho 391, 648 P.2d 203, 207 (1982); *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966); *State v. Campbell*, 215 N.W.2d 227, 229 (Iowa 1974); *State v. Taylor*, 202 Kan. 202, 447 P.2d 806 (1968) (dicta); *Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979); *State v. Madison*, 345 So.2d 485, 490 (La. 1977); *State v. Anaya*, 456 A.2d 1255, 1261-62 (Me. 1983); *Commonwealth v. Bolduc*, 10 Mass. App. 634, 411 N.E.2d 483, 486 (1980) (semble); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966); *State v. Second Judicial District Court*, 85 Nev. 241, 453 P.2d 421 (1969); *People v. India*, 32 N.Y.2d 230, 298 N.E.2d 65, 67 (dicta), *cert. denied*, 414 U.S. 850 (1973); *State v. Parton*, 303 N.C. 55, 277 S.E.2d 419, 418 (1981); *Commonwealth v. Phelan*, 427 Pa. 265, 234 A.2d 540, 547 (1967), *cert. denied*, 391 U.S. 920 (1968); *State v. Murphy*, 89 S.D. 486, 234 N.W.2d 54, 56-57 (1975); *State v. Cunningham*, 18 Wash. App. 517, 569 P.2d 1211 (1977).

Several other States have suggested that they would recognize such a right, but without deciding the question. See *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320, 1327 (1976); *Himes v. State*, 403

mentators have uniformly called for the acknowledgment of this constitutional right.¹⁶

Sensitive to their underlying constitutional obligations, most States provide for the compensation of experts necessary to assist indigent criminal defendants. In addition to those States that have recognized a constitutional right to necessary expert assistance, see n.15, *supra*, at least nineteen States have followed the federal government's lead and provided by statute for the compensation of defense experts.¹⁷ Such a na-

N.E.2d 1377, 1379 (Ind. 1980). And many of the States that have held the appointment of experts not to be required have done so on the ground that no adequate showing of need or prejudice was made in the particular case. See, e.g., *Thessen v. State*, 454 P.2d 341, 352-53 (Alaska 1969), *cert. denied*, 396 U.S. 1029 (1970); *State v. Chapman*, 365 S.W.2d 551 (Mo. 1963); *McKenzie v. Osborne*, 640 P.2d 368, 374-75 (Mont. 1981).

¹⁶ See Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982); Note, *Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection*, 59 Wash. U.L.Q. 317 (1981); Note, *The Indigent Criminal Defendant and Defense Services, A Search for Constitutional Standards*, 24 Hastings L. J. 647 (1973); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632 (1970); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 Minn. L. Rev. 1054, 1060 (1963).

¹⁷ See Ariz. Rev. Stat. Ann. § 13-4013(B) (1978); Cal. Penal Code § 987.9 (West Supp. 1984) (capital cases); Hawaii Rev. Stat. § 802-7 (1968); Ill. Rev. Stat. ch. 38, § 113-3(d) (West Supp. 1983) (capital cases); Iowa Code Ann. § 813.2 (West 1979); Kan. Stat. Ann. § 22-4508 (1981); Mass. Gen. Laws Ann. ch. 261, §§ 27A, 27C(4) (West Supp. 1984); Minn. Stat. Ann. § 611.21 (West Supp. 1984); Mo. Rev. Stat. § 600.150 (1978); Nev. Rev. Stat. § 7.135 (Supp. 1980); N.H. Rev. Stat. Ann. § 604-A:6 (1974); N.M. Stat. Ann. § 31-16-13 (1978); N.Y. County Law § 722-c (McKinney 1979); N.C. Gen. Stat. § 7A-454 (1981); Or. Rev. Stat. § 135.055(4) (Supp. 1981); Pa. Stat. Ann. tit. 19, § 784 (Purdon 1964 & Supp. 1983) (capital cases) (now super-

tionwide consensus "reflects, if it does not establish . . . the fundamental nature of that right." *Powell v. Alabama*, *supra*, 287 U.S. at 73. *Cf. Enmund v. Florida*, 458 U.S. 782, 789-97 (1982) (consensus of state legislatures "weigh[s] heavily" in determining the meaning of the Eighth Amendment). Oklahoma's adamant refusal to provide reasonably necessary expert services to indigent defendants—even in capital cases—is out of step with nationally shared norms of fair criminal procedure.¹⁸

The reasoning of this Court's prior decisions dealing with the rights of indigent criminal defendants logically encompasses a right to expert services that are necessary to a fair defense. *See, e.g., Griffin v. Illinois*, 351 U.S. 12 (1956) (right to trial transcript); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on appeal); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (right to transcript of preliminary hearing); *McMann v. Richardson*, 397 U.S. 759 (1970) (right to effective counsel); *Bounds v. Smith*, 430 U.S. 817 (1977) (right of prisoners to access to law libraries or professional assistance in habeas corpus proceedings). The common rationale of these cases is that indigent defendants and prisoners must have an "ade-

seded by the establishment of a statewide public defender system, *see* Pa. Stat. Ann. tit. 16, § 9960 *et seq.* (Purdon Supp. 1983); S.C. Code Ann. § 17-3-80 (Law. Co-op. 1976); Tex. Code Crim. Proc. Ann. art. 26.05 § 1 (Vernon 1979); W. Va. Code § 51-11-8 (1981).

Several additional States provide specifically for the compensation of defense psychiatrists in cases where the insanity defense is raised. *See* Fla. R. Crim. Pro. 3.216(a) (West Supp. 1983); Ind. Code Ann. § 35-5-2-2 (Burns 1975); Mich. Comp. Laws Ann. § 768.20a(3) (1982); Wash. Rev. Code §§ 10.77-020(2), 10.77.060 (1980).

¹⁸ Oklahoma is not, however, altogether alone in its assertion that an indigent has no right to expert assistance. *See Dutton v. State*, 434 So.2d 853, 856 (Ala. Crim. App. 1983); *Davis v. State*, 374 So.2d 1293, 1298 (Miss. 1979); *State v. Williams*, 657 S.W.2d 405, 411 (Tenn. 1983); *Martin v. Commonwealth*, 221 Va. 436, 271, S.E.2d 123, 129-30 (1980).

quate and effective" (*Griffin*, 351 U.S. at 20) or "meaningful" (*Bounds*, 430 U.S. at 828) opportunity to litigate their claims. As we have shown, the assistance of an expert may in some cases be just as essential to a fair trial as the assistance of a professionally competent attorney or access to a transcript of prior proceedings. It therefore follows that the States are constitutionally obligated to provide expert assistance to indigent criminal defendants in such cases.

Indeed, that conclusion follows *a fortiori* from this Court's decision in *Little v. Streater*, 452 U.S. 1 (1981). In that case, the State assisted the plaintiff in bringing a paternity suit against the defendant, who was indigent. He requested the State to pay the cost of blood grouping tests that could exonerate him; the State refused. 452 U.S. at 3-5. This Court held that the defendant had a due process right to a State-funded blood test. *Id.* at 17. The Court reasoned that he had "substantial" interests at stake in the possibly forced imposition of familial bonds; that the risk of an erroneous determination in the absence of blood tests was "not inconsiderable"; and that the State's financial interest in avoiding payment was insufficient to overcome his interest in avoiding an erroneous adjudication of paternity. *Id.* at 13-16.

The same reasoning applies with even greater force in the context of a criminal prosecution, where the defendant's interest is in his liberty or even, as here, in his very life. To say that an erroneous determination brings about consequences that are both serious and irreversible is but to understate. Balanced against these interests and these consequences is only the State's interest in fiscal economy. As in *Little v. Streater* and as in the *Griffin-Douglas* line of cases, that interest "is hardly significant enough" to overcome the defendant's interests. *Little v. Streater*, *supra*, 452 U.S. at 16. Moreover, the State itself has a very strong interest in the fair and accurate adjudication of criminal cases. As this Court has reminded us:

It is critical that the moral force of the criminal law not be diluted by a [process] that leaves people in doubt whether

innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, 397 U.S. 358, 364 (1970). When expert analysis and testimony is absent from the trial of a case where it was necessary, there cannot be "utmost certainty"—or even much confidence—about the accuracy of the result. Where the absence of such analysis and testimony results only from the poverty of the defendant, it is constitutionally intolerable.

Oklahoma has recognized the necessity of expert services in the most meaningful manner—by providing for State payment of experts' fees *when the experts are hired by the prosecution*. Okla. Stat. tit. 20 § 1304(b)(3) (1980), App. 6a. The State's adamant refusal to provide necessary expert services to indigent criminal defendants—even in capital cases—ignores its constitutional obligation to provide equal justice under law.

B. An Expert Examination of Petitioner's Mental Condition At The Time Of The Offense Was Necessary In This Case.

Glen Ake's constitutional claim to a psychiatric examination on the question of his sanity at the time of the offense was well founded, for that question was seriously in issue and it required expert assistance to be properly determined.

Ake's mental state at arraignment was so obviously abnormal that the judge *sua sponte* ordered him committed for observation. He was found incompetent to stand trial, and six weeks later was rendered "competent" only by being sedated with large doses of Thorazine three times a day during the trial. The doctors who examined him all concluded that he was suffering from paranoid schizophrenia at a psychotic level. J.A. 33, 42, 49. Dr. Allan, a court-appointed psychiatrist who examined Ake to determine his competency to stand trial, testified that Ake's mental illness may have dated from childhood, and that the illness may have been "apparent" on the day of the crime. J.A. 38.

Under Oklahoma law, a defendant has only the burden of raising a reasonable doubt of his sanity at the time of the crime in order to put his mental condition in issue. *Ake v. State*, 663 P.2d at 10, J.A. 78. In light of this standard and the evidence just reviewed, Ake's mental condition—his only serious defense to these capital charges—was clearly in issue. The fact that no expert testimony was presented bearing more specifically on his mental state on the day of the crime is attributable solely to the State's refusal to provide the means for him to be examined on that subject by even a single psychiatrist or psychologist.¹⁹

The assistance of a psychiatrist or a psychologist will in most cases be essential to the fair preparation and presentation of an insanity defense. Just as there are "few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses," *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), there are few—if any—pecunious defendants charged with capital crimes who would fail to obtain the services of a mental health professional to assist them if their only serious defense to those charges was a

¹⁹ The State's conduct in refusing to provide Ake with the means of obtaining a psychiatric opinion as to his sanity at the time of the crime, and then arguing to the jury that the absence of such testimony demonstrated that there was not even a reasonable doubt about his sanity (J.A. 55), cannot be squared with due process. In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that the Fifth and Fourteenth Amendments were violated by a prosecutor's comment on a defendant's refusal to testify. And in *Doyle v. Ohio*, 427 U.S. 610 (1976), the Court ruled that comment on a defendant's silence at the time of arrest was a denial of due process. The injustice here is even more egregious, for Ake's failure to present psychiatric testimony about his mental condition at the time of the crime was not even his volitional choice. He did all he could to obtain such testimony. The State, which could have made such testimony possible, rebuffed his request, and then urged the jury to penalize Ake for its absence. On this ground alone, Ake's conviction should be reversed.

plea of insanity. As with counsel, this is "the strongest indication . . . that [experts] are necessities, not luxuries." *Id.*

In other contexts, the State of Oklahoma fully recognizes the necessity of psychiatric testimony when issues of mental condition are before its courts. In Oklahoma (as in most States) a person may not be civilly committed—a serious deprivation of liberty, but not comparable to a conviction for murder—based on lay testimony alone, but only after an examination by two qualified experts *who are paid a fee for their services by the State*. Okla. Stat. tit. 43A §§ 54.4(F), 56 (1980). And many States are so strongly of the view that a psychiatric examination is the only reliable means of determining a defendant's mental condition at the time of an alleged offense that they compel a defendant who raises the defense of insanity to submit to an examination by the government's expert. See *Estelle v. Smith*, 451 U.S. 454, 465 (1981) (citing cases).

The reasons why expert assistance is essential in preparing and presenting an insanity defense are not obscure. As this Court has noted, the symptoms of insanity are "elusive and often deceptive." *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950). The "common sense" of lay witnesses and jurors "may be the superficial rationalizations by which we avoid the real and deeper meanings of the human mind." But persons of intelligence "recognize this and are prepared to accept explanations of human behavior and natural phenomena that seem esoteric and enigmatic." Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 Mich. L. Rev. 1335, 1343 (1965).

Like an attorney, an expert psychiatrist or psychologist can provide indispensable assistance both before and during trial. Indeed, as with an attorney, pre-trial assistance may often be the more crucial. An expert is necessary not only to conduct an examination of the defendant, but to make the initial determination of what tests and examinations need to be conducted. Elements of a patient's medical or personal history that may seem insignificant to a lawyer may have great meaning to a psychiatrist or psychologist; without an expert's help, a

lawyer may not even know what questions to ask. See Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061, 1066 (1962). For similar reasons, the expert can enable the defense attorney better to anticipate the testimony of the prosecution experts, so as to prepare for cross-examination and rebuttal. F. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* 467 (1970).

And at trial, an expert can convey and explain his findings to the judge and jury in a manner that lay witnesses just cannot match. "All juries will be impressed by lucid explanations of the forces, drives and compulsions which affect the controls of an abnormal personality which has become separated from reality." *Blocker v. United States*, 288 F.2d 853, 864 (D.C. Cir. 1961) (Burger, J., concurring). But lucid explanations of such forces, drives and compulsions cannot be presented by lay witnesses who do not themselves have an educated understanding of such phenomena. In short, the defendant whose defense is insanity simply "cannot expect to succeed unless he can present an expert witness." Goldstein & Fine, *supra*, at 1063. As Justice Brennan once wrote, an attorney appointed to defend such a case without access to expert assistance can often do little but "throw up his hands in despair." Brennan, *Law and Psychiatry Must Join in Defending Mentally Ill Criminals*, 49 A.B.A.J. 239, 242 (1963).

In circumstances like these, the absence of an expert witness "goes to the very trustworthiness of the criminal justice process." *United States v. Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), *cert. denied*, 411 U.S. 984 (1973). Thus the Court's analysis in *Gideon v. Wainwright* and *Powell v. Alabama* applies cogently to this case, *mutatis mutandis*:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to [expert assistance]. Even the intelligent and educated [attorney] has small and sometimes no skill in the science of [psychiatry]. . . . [H]e is incapable, generally, of determining for himself whether [the client was sane or insane at the

time of the crime]. He is unfamiliar with the [necessary psychological and physiological tests]. Left without the aid of [an expert, his client] may be . . . convicted . . . on evidence [which could effectively have been rebutted]. He lacks both the skill and knowledge adequately to prepare his [client's] defense, even though he have a perfect one. He requires the guiding hand of [an expert] at every step in the proceedings against [his client]. Without it, though [the client] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon v. Wainwright, *supra*, 372 U.S. at 344-45, quoting *Powell v. Alabama*, *supra*, 287 U.S. at 68-69.

This Court and other courts have acknowledged the indispensability of mental health professionals in factfinding inquiries in their areas of expertise. In *Addington v. Texas*, 441 U.S. 418 (1979), a case involving the constitutional requirements for civil commitments—where only a person's liberty, not his life, is at stake—the Court evinced its awareness of the “subtleties and nuances of psychiatric diagnosis” which is largely “based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician.” 441 U.S. at 430. The Court therefore appreciated that the question

[w]hether the individual is mentally ill . . . turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.

Id. at 429 (emphasis added).

Lower courts that have considered the question presented here—the necessity of psychiatric assistance in a criminal case where the defense is insanity—have “long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel.” *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974). Thus,

a trial, without expert evidence as to sanity, which found [the defendant] sane and resulted in a life sentence is so lacking in fairness as to be a denial of liberty without due process of law.

Bush v. McCollum, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965). *Accord Proffitt v. United States*, 582 F.2d 854, 857 (4th Cir. 1978), *cert. denied*, 447 U.S. 910 (1980); *United States v. Lincoln*, 542 F.2d 746, 750 (8th Cir. 1976), *cert. denied*, 429 U.S. 1106 (1977); *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973); *United States v. Chavis*, 486 F.2d 1290, 1291 (D.C. Cir. 1973); *Brinks v. Alabama*, 465 F.2d 446 (5th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). The failure of defense counsel to request a psychiatric examination in such circumstances may amount to incompetent representation. *See Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981); *Ex Parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980); *People v. Bryant*, 77 Mich. App. 108, 258 N.W.2d 162 (1977).²⁰

In a case much like this one, where a defendant had been convicted over a plea of insanity in a capital case without any psychiatric testimony as to his sanity at the time of the crime, the experienced trial judge commented:

It seems to this Court difficult if not impossible to say what arguments, or theories, or defenses might have been developed with adequate expert assistance. Mr. Blake received the benefit of no expert help in the preparation of his defense and none in the testing of the prosecution's case. These circumstances seem to the Court to amount to

²⁰ As noted above, the Oklahoma Court of Criminal Appeals found that Ake had not raised even a reasonable doubt of his sanity. It is hard to see what more Ake could have done to raise that issue without the help of an expert; *see n.10, supra*. It appears to be the case that Oklahoma in effect requires the testimony of an expert even to raise a reasonable doubt about sanity. *Cf. Bills v. State*, 585 P.2d 1366, 1371-72 (Okla. Crim. App. 1978) (trial court properly refused to give jury instruction on insanity because defendant, who had been admitted to mental hospital four times in six years prior to crime, had presented “no evidence” tending to rebut the presumption of sanity). The absence of fundamental fairness in refusing to provide psychiatric assistance to an indigent defendant in those circumstances is plain.

a situation where essentially no defense at all [was] presented.

Based on this analysis, he concluded:

[I]n a capital case, a defendant whose sanity at the time of the alleged crime is fairly in question, has at a minimum the constitutional right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information and at such a time as will permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense.

Blake v. Zant, 513 F. Supp. 772, 787 (S.D. Ga. 1981) (Edenfield, J.). While reversing on other grounds, the Eleventh Circuit specifically adopted these views as its own. *Burger v. Zant*, 718 F.2d 979, 981 (11th Cir. 1983), *vacated and remanded on other grounds*, 52 U.S.L.W. 3860 (U.S. May 29, 1984).

Bush v. Texas, 372 U.S. 586 (1963), in which this Court previously granted certiorari on the same question presented here, exemplifies the difference that a proper expert examination can make. James Bush, an indigent, was tried and, over his plea of insanity, convicted of theft and incarcerated. As in this case, the trial court had refused to provide any psychiatric examination with respect to his sanity at the time of the offense. *Bush v. State*, 172 Tex. Crim. 54, 353 S.W.2d 855 (1962). Two years later, virtually on the eve of argument in this Court, the State of Texas finally had Bush examined by a psychiatrist. The finding of that examination was that Bush "was only partly or not at all responsible for his acts, for very many years." 372 U.S. at 589. Upon Texas' representation that Bush would be granted a new trial at which the psychiatric evidence would be available, the case was remanded. *Id.* at 590. Had such an examination been made available to Bush before his trial, it is more than likely that he would not have spent those two years at a Texas prison farm.²¹

²¹ In fact, Bush was not afforded a new trial on remand. His subsequent petition for a writ of habeas corpus was granted by the United States District Court. *Bush v. McCollum*, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965).

A belated psychiatric examination was able to establish James Bush's insanity at the time of the offense. But this will not always be the case. Like the justice lost by the absence of counsel before and at trial, the justice lost by the absence of necessary expert assistance cannot easily be recovered in post-conviction proceedings. The sooner after the relevant events a mental examination is performed, the more reliable it will be. See *Wright v. United States*, 250 F.2d 4, 8-9 (D.C. Cir. 1957); cf. *Drope v. Missouri*, 420 U.S. 162, 183 (1975). Providing indigent defendants whose sanity is seriously in issue with prompt expert examination on that question will not only provide greater protection for the constitutional rights of the accused, but will substantially serve the basic "function of the legal process . . . to minimize the risk of erroneous decisions." *Addington v. Texas*, 441 U.S. 418, 425 (1979). And it will improve the ability of the States to obtain final and constitutionally valid convictions in cases where the accused is in fact guilty. For when a criminal trial properly "concentrates society's resources at one time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence," then the likelihood that there will have to be a retrial, with its attendant social costs, will be minimized. *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982), quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In the long run, justice will be made more speedy, more certain, and less expensive to the States if indigent defendants are provided with necessary expert assistance before trial. See *Brief for the State of Oregon as Amicus Curiae*, *Gideon v. Wainwright*, No. 155, O.T. 1962.

In this case, the trial court and the State of Oklahoma relied on this Court's decision in *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), for the proposition that there is "no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense." Opposition to Petition for Writ of Certiorari at 8; J.A. 20 (trial court).

But *Baldi* cannot stand for that proposition, for in *Baldi* a court-appointed psychiatrist *did* examine the defendant as to his mental state at the time of the crime, and testified on that subject at trial. 344 U.S. at 568. This fact appears to have been

crucial to the Court's holding that no *further* psychiatric assistance to the defendant was required. *Id.* As noted above, Ake moved in the alternative for such an examination, but he was denied even that. *See* n.4, *supra*. Thus, *Baldi* can provide no support for an affirmance here, since in this case there was never any examination of the defendant with respect to his mental condition at the time of the crime by anybody—a point the prosecution emphasized and reemphasized to the jury in arguing that Ake's insanity defense should fail. J.A 55.

In *Baldi* the Court said: "Psychiatrists testified. That suffices." 344 U.S. at 568. But surely it would not have sufficed if their testimony had consisted, like that of the doctors here, only of statements that they had made no examination and had no opinion on the issue before the court.

Baldi may stand for the proposition that where a defendant has been examined by a neutral, court-appointed expert, he is not constitutionally entitled to the appointment or payment of an additional expert to assist *him* in his defense. But *Baldi* was decided at a time when indigent defendants in State courts had no constitutional right even to counsel. *See Betts v. Brady*, 316 U.S. 455 (1942). The law of due process and equal protection has developed considerably since that time. *See, e.g., Gideon v. Wainwright, supra, overruling Betts v. Brady.* Judge Wisdom was therefore clearly correct when he observed that *Baldi* has been "severely undercut" by this Court's decisions since *Griffin v. Illinois, supra. Pedrero v. Wainwright*, 590 F.2d 1383, 1390 n.6 (5th Cir.), *cert. denied*, 444 U.S. 943 (1979).

This case squarely presents the question whether an indigent criminal defendant is constitutionally entitled to expert assistance reasonably necessary to his defense. Such assistance was manifestly necessary in this case, and was denied—perhaps at the cost of the defendant's life. For all the reasons presented above, the Court should take this occasion to hold that the Constitution guarantees such assistance when it is necessary to a fair trial. To the extent, if any, that the decision

in *United States ex rel. Smith v. Baldi* is inconsistent with that proposition, it should be overruled.²²

II. IN A CAPITAL CASE, THE STATE MAY NOT DENY AN INDIGENT DEFENDANT THE MEANS OF PRESENTING EVIDENCE IN MITIGATION OF PUNISHMENT AND IN REBUTTAL OF THE STATE'S EVIDENCE OF AGGRAVATING CIRCUMSTANCES

Because "a consistency produced by ignoring individual differences is a false consistency," *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), this Court has rigorously insisted that there be an individual sentencing procedure in each capital case which "ensures that the sentencing authority is given adequate information" about the offender. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976)(emphasis added). As the Court has explained, "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a con-

²² Our submission is not that State-paid experts should be available to indigent defendants on demand, or that the Constitution requires the States to provide indigents with the same quantum of assistance that a millionaire might choose to mobilize for his defense. We suggest that the Criminal Justice Act's constitutionally-grounded standard of assistance "necessary to an adequate defense," 18 U.S.C. § 3006A(e) (1983), and the workable criteria developed by the federal courts (and by many State courts operating under similar statutes, *see* n.17, *supra*) to implement that standard, may appropriately be applied to implement the constitutional guarantee of due process. *See, e.g., United States v. Theriault*, 440 F.2d 713, 716-17 (5th Cir. 1971) (Wisdom, J., concurring) (indigent defendant entitled to such expert assistance as a reasonable attorney would engage for a client who could afford to pay for it), *cert. denied*, 441 U.S. 984 (1973); *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973) (adopting this standard); *Brinkley v. United States*, 498 F.2d 505, 508-10 (8th Cir. 1974) (same). Compare *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976) (appointment of expert was required where fingerprint evidence was pivotal and was subject to dispute), with *United States v. Harris*, 542 F.2d 1283, 1315 (7th Cir. 1976) (use of psychologist to assist in jury selection not necessary to an adequate defense).

stitutionally indispensable part of the process of inflicting the penalty of death.' " *Eddings v. Oklahoma*, *supra*, at 112, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Just last Term, the Court emphasized that

what is *essential* is that the jury have before it *all possible relevant information* about the individual defendant whose fate it must determine.

Barefoot v. Estelle, 103 S.Ct. 3383, 3396 (1983), quoting *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (emphasis added).

In this case the jury did not receive essential information about defendant Ake's character and personality, because of the State's refusal to provide him with the expert assistance necessary for the preparation and presentation of such information.

The denial of Ake's motion for a psychiatric examination disadvantaged him at his sentencing hearing in two ways: he was unable to put before the jury as mitigating evidence any testimony about his mental condition at the time of the crime or about the psychological effects of the child abuse he had suffered at the hands of his father, and he was unable to rebut the State's evidence, presented through the testimony of psychiatrists, that he was highly likely to commit future acts of violence.²³

The sentencing "hearing" in this case was really no hearing at all. The defense rested about thirty seconds after the State rested. Tr. 703-04. Without access to expert assistance, the defendant was unable to present to the jury the kind of information that this Court has properly regarded as essential to a "measured, consistent application" of the death penalty. *Eddings v. Oklahoma*, *supra*, 455 U.S. at 111.

²³ Ake was unable to testify in his own behalf on these subjects, apparently because of the sedating effects of the Thorazine with which he was being treated. See Part III, *infra*.

A. An Indigent Defendant Facing The Death Penalty Is Entitled To Reasonably Necessary Expert Assistance To Prepare And Present Evidence In His Favor At The Sentencing Hearing.

"Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence are unavailable." *Westbrook v. Zant*, 704 F.2d 1487, 1496 (11th Cir. 1983).

Expert assistance is no less essential, and therefore must be no less available, at a sentencing hearing than it is at trial. As this Court recognized just last month:

A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

Strickland v. Washington, No. 82-1554, slip. op. at 16 (U.S. May 14, 1984).

Evidence about the defendant's mental state at the time of the crime is highly relevant at sentencing. Three of the potentially mitigating circumstances that are specifically recognized in Oklahoma relate to the defendant's state of mind: whether he was "under the influence of extreme mental or emotional disturbance," whether he "believed [that there was] a moral justification or extenuation for his conduct," and whether his "capacity . . . to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law was impaired as the result of mental disease or intoxication." Tr. 725-26.²⁴ One or more of these circumstances may well have been present in this case, *see id.*, but without the assistance of a psychiatrist or psychologist to examine Ake on

²⁴ State statutes that specify mitigating factors which must be considered by the sentencing authority "invariably" include mental disorder. Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Georgetown L. J. 757, 795 (1978).

these points and to present her findings in court, the evidence of these mitigating circumstances—whatever it may have been—was never even discovered, much less provided to the jury.

In a case like this, "it is clear that the defendant's case-in-mitigation—if there is to be one at all—must be built on a foundation of psychiatric testimony." Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 Va. L. Rev. 167, 181 (1980). As at the first stage of the trial, the absence of such testimony goes directly to the accuracy and objectivity of the decision-making process. As Oklahoma recognizes by the specific inclusion of these mitigating circumstances in a judge's charge to a sentencing jury, it might well be a miscarriage of justice to execute a person who, although not legally insane at the time of the crime, was under extreme mental disturbance or had diminished mental capacities. See *Cox v. State*, 644 P.2d 1077, 1079 (Okla. Crim. App. 1982).²⁵ And, as Oklahoma concedes, "[p]sychiatric testimony of the defendant's mental or emotional state at the time of the killing may very likely influence the jury's decision." *Id.* (emphasis added). Yet by refusing to provide an indigent defendant with the services of a person expertly qualified to diagnose and explain such mental and emotional states, Oklahoma virtually guarantees that the jury will not have access to the evidence most relevant to those considerations. In these circumstances, the State's refusal is a denial of due process. *State v. Wood*, 648 P.2d 71, 87-88 (Utah), *cert. denied*, 103 S.Ct. 341 (1982).

In Oklahoma, the prosecutor must make a discretionary decision whether to seek the death penalty. Tr. 717. Here the State made the decision to seek Glen Ake's death, and also decided to refuse him the resources with which to show that,

²⁵ In this case, however, the prosecution argued to the jury (when there was no longer any opportunity for rebuttal) that in rejecting Ake's insanity defense they had necessarily rejected any mitigating circumstance based on mental illness or diminished capacity. See Tr. 730.

under the State's own standards, he did not deserve that ultimate penalty.

If Glen Ake had been able to afford an expert witness, his sentencing hearing could have been a meaningful proceeding. Deprived of assistance, it was but a "meaningless ritual." *Douglas v. California*, *supra*, 372 U.S. at 358.

B. Where The State Uses Psychiatric Testimony To Establish The Aggravating Circumstance Of Predictable Future Violence, It May Not Deny An Indigent Defendant Psychiatric Assistance To Rebut That Testimony.

In *Barefoot v. Estelle*, 103 S.Ct. 3383 (1983), this Court ruled that psychiatric testimony by the State on the question of future dangerousness was acceptable evidence at a capital sentencing hearing. In the Court's view, "jurors should not be barred from hearing the views of the State's psychiatrists along with the opposing views of the defendant's doctors." 103 S.Ct. at 3397.

Here, the jurors were effectively barred from hearing the views of the defendant's doctors to rebut the condemning expert opinions offered by the State, because the defendant could not afford to hire a doctor and the State would not assist him in obtaining one.²⁶

Oklahoma relied on the doctors' testimony to argue that Ake, if allowed to live, would predictably commit future acts of criminal violence. Tr. 714, 717. It is impossible to know whether Ake could have obtained a contrary expert opinion from a different psychiatrist. He—and the jury—were never given an opportunity to find out.

Mindful that there is "a qualitative difference between death and any other permissible form of punishment," this Court has

²⁶ In *Barefoot*, the Court noted that Texas provided payment for expert testimony in cases of indigence, and that there was thus no contention that the State had refused to provide an expert for the defendant. 103 S.Ct. at 3397 n.5. This case thus presents the question not raised in *Barefoot*.

affirmed that " 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Zant v. Stephens*, 103 S.Ct. 2733, 2747 (1983), quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Denying Ake's motion for psychiatric assistance²⁷ created a strong risk that the jury would impose the death penalty despite the existence of factors—unknown to them—that would call for a less severe penalty.

"When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion of Burger, C.J.).

III. PETITIONER'S DRUGGED CONDITION DURING TRIAL DEPRIVED HIM OF THE ABILITY TO ASSIST COUNSEL AND PREJUDICED HIM IN THE EYES OF THE JURY

Throughout his trial, Ake was medicated with Thorazine, administered in doses of 200 milligrams, three times a day. J.A. 26, 49, 52; *Ake v. State*, 663 P.2d 1, 6, J.A. 71. Ake "stared vacantly ahead throughout the trial," *Id.* at 7 n.5, J.A. 73. He remained mute and did not speak with his attorneys. *Id.* at 6, J.A. 71. He did not testify at the trial or at the sentencing hearing.

Unable to ignore these facts, the Court of Criminal Appeals avoided their implications by hypothesizing, without any record support and contrary to the unequivocal testimony of the State's own Chief Forensic Psychiatrist, J.A. 48, 51, that Ake might have been feigning mental illness to bolster his insanity defense. 663 P.2d at 7 n.4, 8, J.A. 72, 74. It is far more likely, however, that Ake was simply displaying the effects and side

²⁷ Ake's motion was not directed specifically at the sentencing proceedings, but the jury, at the penalty stage, may consider the psychiatric evidence presented at the first stage of the trial as a mitigating factor. See *Smith v. Estelle*, 445 F. Supp. 647, 664 (N.D. Tex. 1977), *aff'd*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981).

effects of the Thorazine he was being given. These effects and side effects were, in this case, incompatible with competency to stand trial or with a fair trial by jury.

Thorazine is a strong psychoactive drug widely used in the treatment and control of persons suffering from schizophrenia. Levitt & Krikstone, *The Tranquilizers*, in *Psychopharmacology: A Biological Approach* 117, 126, 131 (R. Levitt ed. 1975). In many cases, its effect is highly therapeutic, reducing hostility and agitation, holding delusions and hallucinations in remission, and generally allowing a patient's thought processes to become reorganized. *Id.* at 131; J. Neale & T. Oltmanns, *Schizophrenia* 410 (1980). It is also true, however, that the simple control of behavior remains a major purpose for its use. *In re Roe*, 383 Mass. 415, 421 N.E.2d 40, 53 (1981); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U. L. Rev. 461, 478 (1977).

For some patients, discontinuance of medication will lead to a reappearance of their psychotic symptoms, so that trial would be impossible *except* under medication. Scrignar, *Tranquilizers and the Psychotic Defendant*, 53 A.B.A.J. 43, 44 (1967); Winick, *Psychotropic Medication and Competence to Stand Trial*, 3 Am. Bar. Foundation Research J. 769, 772-73 (1977). In many cases, then, it may be in the best interest of a criminal defendant, as well as society, for a person accused of crime to stand trial while receiving psychoactive medication. Particularly in non-capital cases, where the defendant's choice may be between incarceration for a term of years (if convicted) and indefinite commitment to a mental hospital, the risk of standing trial under medication may be neither unfair nor unwelcome to the defendant. See Winick, *supra*, at 789-93; R. Roesch & S. Golding, *Competency to Stand Trial* 39-43 (1980).

In some cases, however, the effects of drug treatment will be incompatible with trial. See *id.* at 42. This was such a case.

A. The Trial Court Failed To Inquire Into Petitioner's Competency When Such An Inquiry Was Constitutionally Required.

In *Drope v. Missouri*, 420 U.S. 162 (1975), and *Pate v. Robinson*, 383 U.S. 375 (1966), this Court ruled that a person who cannot understand and participate intelligently in the proceedings against him may not be put to trial.

Petitioner, who had been adjudged incompetent to stand trial in April, was returned to the court as "competent" in May after the administration of Thorazine. J.A. 3, 16. No judicial finding was ever made that he had regained competency and no inquiry was ever made into the cause of his appearance and conduct at trial. Had such an inquiry been made, it would have disclosed that he was far from competent.

The trial judge in this case was not unaware of the facts. Ake's counsel alerted him to their client's inability to communicate, *see, e.g.*, J.A. 26-27; the judge himself observed on the record that there was "all along a real question as to whether the man [Ake] had any kind of mental capacity." Tr. 495. It was the court's constitutional duty "to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." *Drope, supra*, at 172. Yet the court failed to conduct any inquiry into Ake's competency. Such a failure to inquire where, as here, the circumstances "created a sufficient doubt of [Ake's] competence to stand trial to require further inquiry," *Drope*, 420 U.S. at 180, denied Ake a fair trial and mandates that his conviction be reversed. *Id.* at 183; *Pate v. Robinson, supra*, at 386-87.²⁸

²⁸ Before the trial began, Ake's counsel withdrew their motion for a jury trial on the issue of competency. Tr. 3-4. But this did not diminish the court's obligation to inquire into the defendant's competency if the circumstances warranted. *Pate*, 383 U.S. at 384-86; *Drope*, 420 U.S. at 176, 180.

Under Oklahoma law, a court is now authorized by statute "at any time [to] initiate a competency determination on its own motion,

B. Petitioner's Competency To Stand Trial Cannot Be Sustained On This Record.

One prominent side effect of Thorazine—observed in a majority of patients—is drowsiness or sedation. J. Neale & T. Oltmanns, *Schizophrenia* 412 (1980). While many patients develop a tolerance for the sedative effects of the drug after several weeks, some do not; patients "are often seen to be docile, apathetic, and lacking in motivation." T. DuQuesne & J. Reeves, *A Handbook of Psychoactive Medicines* 356 (1982). "[E]ven typical therapeutic dosages may be highly sedating for several hours. This could cause problems at trial if the drugs were administered to the defendant on the typical three- or four-times-a-day schedule." Winick, *Psychotropic Medication and Competence to Stand Trial*, 3 Am. Bar Foundation Research J. 769, 783 (1977).

A closely related side effect is a patient's subjective feeling of isolation and uninvolvedness. He may feel "boredom, lethargy, docility and purposelessness." Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 Wisc. L. Rev. 497, 512. Memory, reasoning ability, and mental speed may all be impaired. *Id.* As one former mental patient described his experience:

On Thorazine everything's a bore. Not a bore exactly. Boredom implies impatience. You can read comic books and "Reader's Digest" forever. You can tolerate talking to jerks forever. Babble, babble, babble. The weather is dull, the flowers are dull, nothing's very impressive. Muzak, Bach, Beatles, Lolly and the Yum-Yums, Rolling Stones. It doesn't make any difference.

M. Vonnegut, *The Eden Express* 252-53 (1975).²⁹ A defendant who is in a condition of such sedation, or of such unconcern

without an application, if the court has a doubt as to the competency of the [defendant]." Okla. Stat. tit. 22 § 1175.2 (1980). This statute became effective on June 25, 1980, while Ake's trial was underway.

²⁹ This indifference to the outside world may be pronounced. In one study, rats that had been trained to climb a pole at the sound of a

about what is going on around him, can hardly "consult with counsel, and . . . assist in preparing his defense"—the minimal prerequisites of competency to stand trial. *Drope v. Missouri*, *supra*, at 171.

It has been suggested that "these problems could be eliminated or reduced (without any loss of clinical benefit) by administering the total daily dose of the drug at bedtime." Winick, *supra*, at 783.³⁰ But this technique was not used here. Rather, Ake continued to receive his Thorazine three times a day throughout the trial, with evident sedative effects.

The State appellate court's cursory rejection of Ake's claim of incompetence is not dispositive, especially where, as here, it was based on sheer speculation. Rather, "it is 'incumbent upon [this Court] to analyze the facts in order that the appropriate enforcement of the federal right may be assured.'" *Drope v. Missouri*, *supra*, at 175, quoting *Norris v. Alabama*, 294 U.S. 587, 590 (1935). On this record, the Court of Criminal Appeals could not rationally have concluded that Ake's competency at trial was established.

C. The Side Effects Of The Drug Administered To Petitioner Prejudiced Him Before The Jury.

Equally serious as the likelihood that Ake was incompetent to stand trial is the likelihood that Ake was prejudiced in the

buzzer in order to avoid an electric shock took no notice of the buzzer after being administered a very small dose of Thorazine. See R. Julien, *A Primer of Drug Action* 129 (1975).

³⁰ Because Thorazine is intrinsically long-acting, there is "no clinically significant difference in the therapeutic effect" between a single dose of 600 mg. at bedtime and doses of 200 mgs. three times a day. G. Honigfeld & A. Howard, *Psychiatric Drugs* 24, 147 (2d ed. 1978). Even where competence to stand trial is not a concern, it is good medical practice, once the patient has been stabilized, to administer a single daily dose in the evening. L. Hollister, *Clinical Pharmacology of Psychotherapeutic Drugs* 162-63 (1978); E. Bassuk & S. Schoonover, *The Practitioner's Guide to Psychoactive Drugs* 118 (1977).

eyes of the jurors because of the effects of the Thorazine—at the cost of his life.

In addition to his sedated condition, some of the symptoms Ake apparently displayed at trial are among the common extrapyramidal (central nervous system) side effects of Thorazine treatment, known as parkinsonisms: muscular rigidity, a stooped posture, motor retardation, a "mask-like" face. T. Duquesne & J. Reeves, *A Handbook of Psychoactive Medicines* 357 (1982); *In re Roe*, *supra*, 421 N.E.2d at 53-54; *In re K.K.B.*, 609 P.2d 747, 748 n.3 (Okla. 1980); 5 R. Herrington & M. Lader, *Handbook of Biological Psychiatry* 91 (1981). At the dosage level being administered to Ake, these side effects are observed in 15% to 25% of patients. *Id.*

Counsel's references to Ake's "zombie"-like appearance, J.A. 26, Tr. 659, 661, coincide precisely with the medical observations:

[O]ne should not only watch for the conventional parkinsonian symptoms . . . but also be aware that patients who appear apathetic, . . . lifeless, *zombie-like*, or drowsy, may be demonstrating subtle extrapyramidal side effects.

Davis, *Antipsychotic Drugs*, in 3 *Comprehensive Textbook of Psychiatry* 2257, 2281 (H. Kaplan, A. Freedman & B. Sadock 3rd ed. 1980) (emphasis added).

[T]hese patients *sometimes appear "zombie-like"* because of the neurological side effects of these drugs.

. . . .
One symptom that is often misperceived as evidence of psychopathology is actually an extrapyramidal side effect called akinesia, wherein the patient feels apathetic and is reluctant to move his body. *This syndrome in fact may account for the "zombie" look frequently seen among patients at psychiatric hospitals.*

G. Honigfeld & A. Howard, *Psychiatric Drugs* 16, 25 (2d ed. 1978) (emphasis added).³¹

³¹ Just as there are clinical techniques that can be used to ameliorate the sedative effects of Thorazine, see n.30, *supra*, it is possible to

A defendant's appearance and demeanor in the courtroom are always an important part of his case. *Criminal Defense Techniques* § 24A.03[3] (S. Bernstein ed. 1983); F. Bailey & H. Rothblatt, *Fundamentals of Criminal Advocacy* § 154 (1974). Cf. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (appearance of defendant in prison garb "may affect a juror's judgment"). Never is this more true than where the defense is insanity. In such a case, the defendant's appearance and demeanor is itself a matter of probative value for the jury:

[H]is deportment, demeanor and day-to-day behavior during that trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justifiability of his defense of insanity.

In re Pray, 133 Vt. 253, 336 A.2d 174, 177 (1975). *Accord State v. Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971) (reversing conviction when defendant was administered tranquilizers during trial where his sanity was in issue).

The defendant's appearance and demeanor are equally if not more important at the sentencing stage. In *State v. Murphy*, 56 Wash. 2d 761, 355 P.2d 323 (1960), a defendant in a capital case was granted a new trial because he had been tried in a drugged condition. The *Murphy* court recognized that the demeanor of a defendant could influence the jury in assessing whether to impose the death penalty:

the matter of the life or death of the accused may well depend upon the attitude, demeanor and appearance he

eliminate or reduce these extrapyramidal side effects by switching the patient from Thorazine to another psychoactive drug, or by administering anti-parkinsonian drugs. See Greenblatt, Shader & DiMascio, *Extrapyramidal Effects*, in *Psychotropic Drug Side Effects* 92, 94-95 (R. Shader & A. DiMascio eds. 1977); Hollister, *Psychopharmacology*, in *Schizophrenia: Science and Practice* 152, 163 (J. Shershow ed. 1978). The record indicates that these techniques were not attempted here. See J.A. 16. Had a psychiatrist been appointed to assist the defendant, he or she might have been able to suggest the use of such measures.

presents to the members of the jury. [This requires] careful judicial scrutiny of every aspect of the trial afforded to the accused to the end that a new trial be granted in the event of a showing by the accused of a reasonable possibility that his attitude, appearance, and demeanor, as observed by the jury, have been substantially influenced or affected by circumstances over which he had no real control.

Id. at 327. Glen Ake's "zombie-like" appearance before the jury while drugged denied him a fair chance for the jury to "assess [his] demeanor and character." *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973). Indeed, the Thorazine he was forced to take very likely prevented him from—or made him too lethargic or unconcerned to care about—testifying before the jury. See J.A. 55 ("We cannot get a yes or no if he wants to take the stand, so we rest.").

In a capital case, the interest of society in bringing an accused person to trial, and the interest of the defendant in having an opportunity to establish his innocence, cannot justify the risk that a man will be sent to his death because the side effects of the drugs that are being administered to him without his consent have made the jury believe that he has no interest in his case, no remorse for his crime, and, perhaps, is a "zombie" without a soul.

CONCLUSION

For the foregoing reasons, the judgment of the Oklahoma Court of Criminal Appeals should be reversed, and the case remanded for a new trial.

Respectfully submitted,

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* Counsel wish to acknowledge the research assistance of Susan Angell, Esq., in the preparation of this brief.

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in pertinent part:

* * * No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The laws of Oklahoma provide:

Okla. Stat. tit. 21 § 701.7 (1980): **Murder in the first degree.**

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Okla. Stat. tit. 21 § 701.9 (1980): **Punishment for murder.**

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Okla. Stat. tit. 21 § 701.10 (1980): **Sentencing proceeding—Murder in the first degree.**

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without pre-sentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. tit. 21 § 701.11 (1980): **Instructions—Jury findings of aggravating circumstance.**

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a

reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. tit. 21 § 701.12 (1980): **Aggravating circumstances.**

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Okla. Stat. tit. 21 § 701.13 (1980): **Death Penalty—Review of sentence**

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice

shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Okla. Stat. tit. 21 § 701.14 (1980): Appointment of counsel—Fees.

In all cases, wherein the defendant is subject to the death penalty triable in the State of Oklahoma, where it is satisfactorily shown to the trial court that the defendant has no means and is unable to employ counsel, the court shall, in all such cases, where counsel is appointed and assigned for defense, allow and direct to be paid from the State Judicial Fund, a reasonable and just compensation to the attorney so assigned for such services as they may render such compensation being allowable in any court of record. Provided, however, that such attorney shall not be paid a sum to exceed Two Thousand Five Hundred Dollars (\$2,500.00) in any one case, the specific amount to be left to the discretion of the trial judge.

Okla. Stat. tit. 20 § 1304 (1980): Claims allowable—Approval—Limitation on courthouse building.

(a) Claims against the court fund shall include only such expenses as may be lawfully incurred for the operation of the court in the county.* * *

(b) The term "expenses" shall include the following items and none others:

* * *

(3) juror and witness fees * * * except that expert witnesses who appear on behalf of the State of Oklahoma shall be paid a reasonable fee for their services from the court fund;

* * *

(8) attorney's fees for indigents in the trial court and on appeal;

* * *

Okla. Stat. tit. 22 § 1171 (1971): Doubt as to present sanity prior to calling of indictment or information for trial or preliminary hearing.*

If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and prior to the calling of an indictment or information for trial or preliminary hearing, a doubt arises as to his present sanity, either such individual or the district attorney may make application to the District Court for an order committing such individual to a state hospital within the Department of Mental Health for observation and examination for a period not to exceed sixty (60) days. Provided, however, where an adequate examination can be had in the county where the charge is pending, such examination shall be held in such county. Provided, however, the court may extend the sixty-day period where a need for such extension is shown. Any criminal proceedings against such individual shall be suspended pending the hearing of the application by the District Court.

*Repealed by Laws 1980, c. 336, § 10, effective June 25, 1980. Replaced by Okla. Stat. tit. 22 §§ 1175.1 to 1175.8 (1980), effective June 25, 1980.

Office-Supreme Court, U.S.
FILED

AUG 20 1984

ALEXANDER L. STEVAS,
CLERK

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Respondent.

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether, under the facts and circumstances of this case, the due process clause of the Fourteenth Amendment required the State to provide funds to allow the Petitioner to hire expert witnesses to assist in his defense.

2. Whether a State has the constitutional duty to provide funds to assist a criminal defendant discover mitigating evidence in a capital case.

3. Whether the facts of the present case present a situation where the Petitioner's claim that he was unable to comprehend the nature of the proceedings against him and to assist in his defense due to the medication prescribed for him is supported by the record.

TABLE OF CONTENTS

	<u>Page</u>
OPINION BELOW.	1
JURISDICTION	1
CONSTITUTIONAL AND STATU- TORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.	2
SUMMARY OF ARGUMENT.	15

PROPOSITION I

WHERE AKE HAD NO HISTORY OF MENTAL ILLNESS, GAVE A FORTY-FOUR PAGE DETAILED ACCOUNT OF THE MURDERS HE COMMITTED, FOUR MONTHS PASSED FROM THE TIME OF THE MURDERS UNTIL THE FIRST INDICATION OF MENTAL ILLNESS APPEARED, AND AKE'S ATTORNEYS DECLINED TO CALL AS WITNESSES ANY LAY PERSONS TO TESTIFY AS TO AKE'S MENTAL CONDITION AT THE TIME OF THE CRIME DESPITE THE AVAILABILITY OF A NUMBER OF SUCH WITNESSES, THE STATE WAS NOT CONSTITUTIONALLY REQUIRED TO ALLOT FUNDS FOR THE PAYMENT OF EXPERT WITNESSES ON THE ISSUE OF INSANITY AT THE TIME OF THE COMMISSION OF THE CRIME. . . . 19

TABLE OF CONTENTS

Page

PROPOSITION II

IN A CAPITAL CASE, THE STATE HAS NO DUTY TO ASSIST A CRIMINAL DEFENDANT DISCOVER MITIGATING EVIDENCE; IN THE PRESENT CASE AKE WAS FREE TO INTRODUCE ANY MITIGATING EVIDENCE AND THEREFORE THE CONSTITUTIONAL REQUIREMENTS OF LOCKETT AND EDDINGS WERE COMPLIED WITH . . 49

PROPOSITION III

WHERE AKE'S ATTORNEY WITHDREW HIS MOTION FOR SANITY TRIAL TO DETERMINE PRESENT SANITY AND THUS DID NOT AVAIL HIMSELF OF THE PROCEDURE IN OKLAHOMA FOR DETERMINING COMPETENCY TO STAND TRIAL, HE CANNOT NOW CONTEND THAT HE WAS UNABLE TO COMPREHEND THE PROCEEDINGS AGAINST HIM. 54

CONCLUSION 57

APPENDIX A 1a

TABLE OF AUTHORITIESPage

Cases:

<u>Beck v. State</u> , 626 P.2d 327 (Okl.Cr. 1981)	55
<u>Bradbury v. Wainwright</u> , 658 F.2d 1083 (5th Cir. 1981) . . .	41
<u>Brinks v. Alabama</u> , 465 F.2d 446 (5th Cir. 1972)	42
<u>Burger v. Zant</u> , 718 F.2d 979 (10th Cir. 1983)	39
<u>Bush v. McCollum</u> , 231 F.Supp. 560 (N.D. Tex. 1964), aff'd 344 F.2d 672 (5th Cir. 1965) . .	42
<u>Christian v. United States</u> , 398 F.2d 517 (10th Cir. 1968)	39
<u>Coker v. Georgia</u> , 433 U.S. 584 (1977)	36
<u>Cox v. State</u> , 644 P.2d 1077 (Okl.Cr. 1982)	55
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637 (1974)	45
<u>Drope v. Missouri</u> , 420 U.S. 162 (1975)	18, 34, 55
<u>Dusky v. United States</u> , 362 U.S. 402 (1960)	34

TABLE OF AUTHORITIESPage

Cases:

<u>Eads v. State</u> , 460 P.2d 1370 (Okl.Cr. 1982)	48
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	51
<u>Engle v. Isaac</u> , 456 U.S. 107 (1982).	48
<u>Estelle v. Williams</u> , 425 U.S. 501 (1976)	48,49
<u>Faretta v. California</u> , 422 U.S. 806 (1975)	34
<u>Hawkins v. State</u> , 569 P.2d 490 (Okl.Cr. 1977).	48
<u>High v. State</u> , 401 P.2d 189 (Okl.Cr. 1965).	28
<u>Hintz v. Beto</u> , 379 F.2d 937 (5th Cir. 1967)	43
<u>Hoback v. Alabama</u> , 607 F.2d 680 (5th Cir. 1979)	41
<u>Hurley v. State</u> , 416 P.2d 967 (Okl.Cr. 1966).	48
<u>Leland v. Oregon</u> , 343 U.S. 790 (1952).	35,36
<u>Little v. Streater</u> , 452 U.S. 1 (1981).	37,45

TABLE OF AUTHORITIESPage

Cases:

<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978).	51
<u>Matlock v. Rose</u> , 731 F.2d 1236 (6th Cir. 1984). . . .	40, 45, 47
<u>Matthews v. Eldridge</u> , 424 U.S. 319 (1976)	47
<u>Moore v. Zant</u> , 722 F.2d 648 (11th Cir. 1983).	40
<u>Patterson v. New York</u> , 432 U.S. 197 (1977)	36
<u>Payne v. Thompson</u> , 622 F.2d 254 (6th Cir. 1980)	41
<u>Pedrero v. Wainwright</u> , 590 F.2d 1383 (5th Cir. 1979) .	41, 42, 43
<u>Powell v. Texas</u> , 392 U.S. 514 (1968).	35
<u>Proctor v. Harris</u> , 413 F.2d 383 (D.C. Cir. 1969).	39
<u>Richards v. Solem</u> , 693 F.2d 760 (8th Cir. 1982)	52
<u>Rivera v. Delaware</u> , 429 U.S. 877 (1976).	36
<u>Rogers v. State</u> , 634 P.2d 743 (Okla. Cr. 1981).	47

TABLE OF AUTHORITIESPage

Cases:

<u>Sandstrom v. Montana</u> , 442 U.S. 510 (1979)	38
<u>Satterfield v. Zahradnick</u> , 572 F.2d 443 (4th Cir. 1978)	41
<u>Solem v. Stumes</u> , 104 S.Ct. 1338 (1984)	46
<u>Strong v. State</u> , 547 P.2d 383 (Okl.Cr. 1976).	48
<u>United States v. Decoster</u> , 624 F.2d 196 (D.C. Cir. 1976)	39
<u>United States ex rel. Smith v. Baldi</u> , 344 U.S. 561 (1953) .	34
<u>Washington v. Texas</u> , 388 U.S. 14 (1967).	33
<u>Watson v. Patterson</u> , 358 F.2d 297 (10th Cir. 1966) . . .	39
<u>Westbrook v. Zant</u> , 704 F.2d 1487 (11th Cir. 1983)	40, 53
<u>Wilson v. State</u> , 568 P.2d 1279 (Okl.Cr. 1977)	28

TABLE OF AUTHORITIESPage

Statutes:

Federal

18 U.S.C. § 3306A	39
28 U.S.C. § 1257(3)	1

State

Okla. Stat. Ann., tit. 21, § 652 (West Supp. 1979)	2
Okla. Stat. Ann., tit. 21, § 701.7 (West Supp. 1979)	2
Okla. Stat. Ann., tit. 21, § 701.10.	51
Okla. Stat. Ann., tit. 21, § 701.12 (West Supp. 1979).	3
Okla. Stat. Ann., tit. 21, § 1171 (West 1979).	11
Okla. Stat. Ann., tit. 22, § 715	33
Okla. Stat. Ann., tit. 22, § 718	33
Okla. Stat. Ann., tit. 22, § 723	33
Okla. Stat. Ann., tit. 22, §§ 1161 et seq. (West Supp. 1971)	35,55

TABLE OF AUTHORITIESPage

Statutes:

Okla. Stat. Ann., tit. 22, §§ 1175.1 et seq. (West Supp. 1983)	35
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Other Author-
ties Cited:

U.S. Const., Fourteenth Amendment	2
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BRIEF OF RESPONDENT

OPINION BELOW

The Opinion of the Oklahoma Court
of Criminal Appeals is reported at 663
P.2d 1 (Ok1.Cr. 1983).

JURISDICTION

This Court's jurisdiction is in-
voked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Glen Burton Ake, a/k/a Johnny Vandover (hereinafter referred to as "Ake") was convicted of two counts of Murder in the First Degree, Okla. Stat. Ann. tit. 21, § 701.7 (West Supp. 1979) and two counts of Shooting With Intent to Kill, Okla. Stat. Ann. tit. 21, § 652 (West Supp. 1979), in the Dis-

trict Court of Canadian County, State of Oklahoma.

Ake was convicted by a jury which also found the existence of three aggravating circumstances.¹ Ake received a death sentence from the jury for each of the two murders for which he was convicted and a sentence of five hundred years for each of the convictions for Shooting With Intent to Kill.

The facts which were presented to the jury reveal that on October 15, 1979, Ake and his co-defendant, Steven Keith Hatch, quit their jobs on an oil

¹ The jury found that (1) the murder was especially heinous, atrocious or cruel; (2) the murders were committed to avoid or prevent a lawful arrest or prosecution; and (3) a probability existed that Ake would commit criminal acts of violence that would constitute a continuing threat to society. See Okla. Stat. Ann., tit. 21, § 701.12 (West Supp. 1979).

field rig (Tr. 386),² borrowed a car from a friend and employer, Dwayne Lucas (Tr. 386) and went looking for a location to burglarize (A. 4a)³

Ake and Hatch finally decided upon a house which was that of Reverend Richard Douglass, his wife Marilyn, and their two children, Brooks, age sixteen, and Leslie, age twelve. The Douglasses had recently returned from Brazil where they had performed missionary work (Tr. 446).

Ake obtained entry into the house using the ruse of attempting to locate the residence of another person in the area (Tr. 430-432). While Ake was in

² "Tr." refers to the trial transcript.

³ "A" refers to the confession of Ake given on November 23, 1979 and signed on November 26, 1979 and which is attached hereto as "Appendix A."

the house, Hatch entered with a shotgun and Ake pulled out a handgun which he had been concealing in his belt, held it in the face of the boy, Brooks, and said that if he tried to do anything, he would blow his head off (Tr. 434).

The boy went to get his father, who was in the bedroom (Tr. 434). The father stepped momentarily into the bathroom and Ake stuck his handgun in Reverend Douglass' stomach, and asked him what he was doing (Tr. 435). Ake pulled him out of the bathroom and checked his pockets (Tr. 435). Ake then took Reverend Douglass back into the bedroom and asked him for his money and wallet (Tr. 435). During this time Hatch had the shotgun on Mrs. Douglass, the boy and the girl (Tr. 435).

Ake then took Brooks (the boy) to his bedroom and had him obtain money

from his wallet (Tr. 436). Ake then took Mrs. Douglass to her room for the same purpose (Tr. 436).

The Douglass family members were forced to lie on their stomachs on the living room floor and were bound with rope and gagged with curtain sash (Tr. 437). Ake tied them up (Tr. 437), began ransacking the house, searching for money (Tr. 283,437). Ake took the Douglass' twelve year old daughter, Leslie, around the house looking for money and then took her into the bedroom and forced her to undress (Tr. 419-420,437). He and Hatch then unsuccessfully attempted to rape the girl after putting suntan lotion on their penises to use as a lubricant (Tr. 420,425). Mrs. Douglass wept as she heard her daughter crying during the rape attempts (Tr. 438).

During most of this time Hatch guarded the Douglasses with the shotgun, threatening them if they moved (Tr. 438-439). Ake and Leslie (the girl) returned to the living room and she also was tied up (Tr. 439). The heads of Reverend Douglass, his wife, and the boy were covered with shirts (Tr. 421-438). Ake remarked to the family that he liked to shoot people. Ake asked them if they had seen the car and the Douglasses stated they had not (Tr. 439). He kept talking about shooting people and how there was nothing wrong with it and wondered whether or not he should shoot them (Tr. 440). He then sent Hatch outside to start the car (Tr. 440). After Hatch left, Ake asked "for four hours," to which the family agreed (Tr. 422, 427, 440). Mrs. Douglass pleaded with Ake not to shoot them (Tr. 440).

Ake said "I'm in a bad position. I don't want to shoot you all but, . . ." (Tr. 441) and "I'm sorry but dead men don't talk" (A. 39a). When Mrs. Douglass started to say something Ake shot all four family members in the back with the handgun and left (Tr. 422, 441).

Reverend Douglass and his wife died from the gunshot wounds as their son attempted to untie them (Tr. 422-423, 442). Partial strangulation was also a contributing cause of death to Reverend Douglass (Tr. 325,332). The children survived the gunshot wounds to the back and eventually freed themselves and fled to a neighbor's house.

After the shooting Ake and Hatch, fled to Arkansas, Tennessee, Louisiana, Texas, California, Nevada, Utah, Wyoming and Colorado (A. 6a-11a). While in Louisiana, Ake and Hatch showed some

jewelry to a woman who traveled with them named Virginia Keefe. Ake told her that they had gotten it from some people in Oklahoma that they had killed (Tr. 456-457, 460). Ms. Keefe at one time wore some of this jewelry (Tr. 456), including Mrs. Douglass' wedding ring, which was seized from Hatch when he was arrested (Tr. 411, 445-446, 460). Ms. Keefe also observed a credit card belonging to Mrs. Douglass in the possession of Ake and Hatch (Tr. 45). Ms. Keefe later used the card herself (Tr. 459). She said that Ake and Hatch had also both worn the jewelry (Tr. 459-460). Ms. Keefe testified that Ake had telephoned his sister and that she had advised him that the Douglass children had survived (Tr. 457). Ms. Keefe stated that Ake became "scared" upon learning this news (Tr. 457).

Ake and Hatch were arrested in Colorado on November 20, 1979. Upon being booked into the jail, the ring belonging to Mrs. Douglass was found on Hatch and the credit card belonging to Mrs. Douglass was found on Ake (Tr. 410-412).

Ake was returned to Oklahoma and placed in the El Reno city jail. Three days after his arrest, on November 23, 1979, he advised the jail dispatcher, LuAnn Ramming, that he wished to speak with the Sheriff and the Oklahoma State Bureau of Investigation (Tr. 504-506). When the Sheriff arrived, Ake stated that he had some things he wanted to "get off his chest" (Tr. 506,512).

Ake gave the officers a forty-four page statement which was taped, subsequently reduced to writing, corrected, and signed by Ake three days later (Tr.

552-525). This statement was introduced at trial as Exhibit No. 68 (Tr. 546-549; Appendix "A" infra). In this statement Ake confessed to the shooting of the Douglass family.

Ake was arraigned on November 23, 1979 and on December 11, 1979 he and Hatch again appeared before the court. At that time Hatch's attorney requested and obtained an order transferring Hatch to the state mental hospital for a sixty day observation period to determine competency to stand trial.⁴ Ake was present in court with his attorney, but no such request was made on his behalf. (December 11, 1979 Transcript, p. 2-4).

On January 21, 1980, the preliminary hearing for both Ake and Hatch was held. Again no objections to the pro-

⁴ Okla. Stat. Ann. tit. 21 § 1171 (West 1971) provided that if a doubt

ceedings or motions relating to Ake's competency were made. Ake and Hatch were bound over for trial at the conclusion of that hearing.

On February 14, 1980 Ake appeared for formal arraignment. Ake became disruptive during that time. Subsequently, on February 20, 1980 the court ordered Dr. William Allen, a psychiatrist in private practice, to examine Ake to determine his competency to stand trial. On April 10, 1980 a competency hearing was held and at the conclusion of such the court found that Ake was a mentally ill person in need of care and treatment and he was transferred to the state mental hospital, Eastern State Hospital.

4 (Continued) arose as to the sanity of a criminal defendant, he could be committed to the state hospital for a period not to exceed sixty days.

On May 22, 1980 Dr. R.D. Garcia, Chief Forensic Psychiatrist for Eastern State Hospital, sent the court a letter advising that Ake was now competent to stand trial and recommended that he be maintained on 200 milligrams of Thorazine, three times a day. Ake was returned to Canadian County and on June 23, 1980 the jury trial for Ake was commenced. Hatch was tried in a separate proceeding.

At the time of trial Ake's attorney withdrew a pending Motion for Jury Trial on Present Sanity (Tr. 2-4). Outside of the presence of the jury the State produced testimony of a cellmate of Ake, who testified that Ake had told him that he was going to try to "play crazy" (Tr. 15).

At trial both Douglass children testified as to the events surrounding

the terrorizing of their family and the murder of their parents by Ake. Ake was identified in court by both as the person who murdered their parents (Tr. 427,448) and the boy identified his parents' jewelry (Tr. 445-446) and credit card (Tr. 446-447) which were in Ake and Hatch's possession when arrested. The State also introduced the signed confession in which Ake admitted to the shooting of the Douglasses. (State's Exhibit No. 68; Appendix A, *infra*).

Dwayne Lucas, Ake's employer, and Virginia Keefe, their traveling companion, testified concerning their association with Ake and Hatch, which included Ms. Keefe's testimony concerning Ake's admission to her about the killings and his telephone call to his sister (Tr. 456-460).

The State also introduced evidence that Ake's palm print, which had been lifted from the telephone receiver in the Douglass' bedroom (Tr. 398-404). Ballistics linked the bullet found at a place where Ake and Hatch had been target shooting on the morning of the murders with bullets found at the Douglass residence (Tr. 351-367, 384-386, 394-397).

The only evidence presented by Ake in his defense was that of three doctors (two psychiatrists and a physician) concerning his mental condition months after the murders.

SUMMARY OF ARGUMENT

The facts of the present case do not present a situation in which the due process rights of a defendant have been violated.

The facts reveal an overwhelming amount of evidence against Ake. Shortly after his arrest, which occurred approximately five weeks after the murder, Ake gave law enforcement officers a forty-four page taped confession which was reduced to writing and then corrected and signed by Ake three days later.

More than four months passed after the murders before any claim was made concerning his mental condition. Approximately two weeks after his arrest Ake and his attorney appeared in court and watched Ake's co-defendant obtain an Order transferring him to the State mental hospital for observation. Ake's attorney made no such motion and over a month later the preliminary hearing was held and Ake was bound over without any allegation being made concerning Ake's mental state.

At trial Ake's attorney declined to call any of Ake's family, friends, co-workers or associates regarding the issue of his sanity at the time of the murders even though such testimony is admissible in Oklahoma. Three doctors conducted examinations concerning his competency to stand trial and Ake's motion for jury trial on the issue of present insanity was withdrawn at the time of trial. Furthermore, Ake had no history of mental illness.

Ake's confession set forth in lucid detail the facts relating to the Douglass' murders. The confession also contained explicit accounts of Ake's activities on the day of the murders and his subsequent flight following such. All witnesses to the confession testified concerning his rational demeanor

and mental status at the time the confession was given.

There was no showing that Ake had possessed any mental illness at the time of the murders. The first sign of any mental illness occurred four months after the murders, subsequent to his preliminary hearing, and Ake received prompt psychiatric examination and treatment with regard to his competency to stand trial. The constitutional mandates of Drope v. Missouri, 420 U.S. 162 (1975) were therefore complied with.

Under the facts of the case the Constitution does not require the State to provide expert witnesses with regard to Ake's mental status at the time of the commission of the murders.

ARGUMENTPROPOSITION I

WHERE AKE HAD NO HISTORY OF MENTAL ILLNESS, GAVE A FORTY-FOUR PAGE DETAILED ACCOUNT OF THE MURDERS HE COMMITTED, FOUR MONTHS PASSED FROM THE TIME OF THE MURDERS UNTIL THE FIRST INDICATION OF MENTAL ILLNESS APPEARED, AND AKE'S ATTORNEYS DECLINED TO CALL AS WITNESSES ANY LAY PERSONS TO TESTIFY AS TO AKE'S MENTAL CONDITION AT THE TIME OF THE CRIME DESPITE THE AVAILABILITY OF A NUMBER OF SUCH WITNESSES, THE STATE WAS NOT CONSTITUTIONALLY REQUIRED TO ALLOT FUNDS FOR THE PAYMENT OF EXPERT WITNESSES ON THE ISSUE OF INSANITY AT THE TIME OF THE COMMISSION OF THE CRIME.

In his brief Ake asserts that the United States Constitution required the State of Oklahoma to provide funds for "reasonably necessary expert assistance." Ake argues that the State is constitutionally required to furnish expert assistance not only in the form of expert witnesses at trial but also with regard to trial preparation. The State contends that if any such previ-

ously undiscovered constitutional right exists, the facts in the present case do not justify the invocation of such a right on behalf of the Petitioner Glen Burton Ake.

The facts of the case, as more fully set forth in the transcript and Ake's confession, reveal a calculated and savage terrorizing of the Douglass family. Nothing in the conduct of the crime itself, apart from a certain amount of consumption of alcohol and drugs by Ake and his companion Hatch, give the slightest indication that this was anything other than a premeditated robbery-murder. From the time of the ruse used by Ake to gain entry into the Douglass' home, the coordination of the simultaneous production of weapons by the Ake and Hatch, the systematic search of the Douglass' home by Ake, the tear-

ing out of all three telephones in the residence, the binding and gagging of the victims, to the ingenuity of Ake in applying suntan lotion to his penis in order to facilitate the rape of the twelve year old Leslie, Ake exhibited no signs of mental illness.

Next, on November 23, 1979, after being arrested after traveling through nine states and using an assumed name, Ake gave law enforcement officers a lucid forty-four page confession which gives a detailed chronology of the robbery, murders and subsequent flight. Ake was even able to remember the order in which he shot the Douglasses (A. 39a).

The statement corroborates in detail the accounts given by other witnesses. It recounts the travels of Ake and Hatch from state to state. A

notable exception to the account given by witnesses is the refusal of Ake to admit the attempted rape of the twelve year old girl (A. 34a), which may reflect recognition on his part of the harsh treatment reputed to be imposed upon child molesters by fellow prison inmates. The recitation of the events referred to refutes any claim that Ake was delusional at the time of the murders. Furthermore, no statement in the confession reflects on his mental competency.

After Ake gave the taped statement to the officers on November 23, three days later the statement was reduced to writing, reviewed, corrected and signed by the Petitioner. Review of the written statement reveals the corrections made by Ake, a fact testified to by

Sheriff Stedman (Tr. 547-548).⁵

Agent Shields of Oklahoma State Bureau of Investigation testified that when Ake gave his statement he was very calm and communicated well (Tr. 523). Sheriff Stedman, who was also present when the confession was given, testified that Ake was responsive, coherent and alert (Tr. 536). The confession was given after Ake himself notified the jailer that he wished to see the Sheriff and Oklahoma State Bureau of Investigation (Tr. 506).

Since the statement was given five weeks after the murders, this too should

⁵ Obviously, the reproduction of the statement in Appendix A, infra, does not contain the handwritten corrections made by Ake. Certain blank pages and spaces appear throughout the statement due to the fact that part of it was excised to delete references to other crimes (Tr. 479-482, 502).

disprove Ake's claim of insanity at the time of the murders in view of his detailed recollection of such.

Furthermore, testimony at trial revealed that, when in Louisiana, Ake made a statement to Virginia Keefe that he had obtained the jewelry that he and Hatch showed her from some people in Oklahoma they had killed (Tr. 456-457, 460). According to Ms. Keefe, Ake also telephoned his sister and became "scared" when told that "the two kids had lived" (Tr. 457). When arrested in Colorado, Ake had the credit card of Mrs. Douglass in his possession (Tr. 411). This card and some of Mrs. Douglass' jewelry had been given to Ms. Keefe to use and wear at certain times after the murders (Tr. 458-461). Ms. Keefe also testified that Ake eventually told her that his name was not "Skip

Thompson" as he had previously told her (Tr. 452) but Glen Ake (Tr. 457).

After the confession was given on November 23 and 26, 1979, Ake and his attorney appeared before the Court on December 11, 1979. These proceedings are set forth in a transcript which is a part of the record. At that hearing Hatch's attorney obtained an order committing Hatch to a State Mental hospital for observation (p. 4). The Court continued the preliminary hearing from December 17, 1979 until January 21, 1980 to allow Hatch to undergo observation (p. 3-4).

The record reveals that no attempt was made by Ake's attorney to secure a similar mental examination for his client.

Thereafter, on January 21, 1980, the preliminary hearing for Ake and

Hatch was held. The preliminary hearing was completed and Ake and Hatch were bound over for trial. The transcript of this hearing also reveals that no attempt of any kind was made to secure any mental examination of Ake and no objection to the proceeding was made on the basis of his mental condition.

On February 14, 1980 Ake was formally arraigned. On February 20, 1980 the court, in response to Ake's behavior at arraignment and other incidents of bizarre behavior which had been reported to the court, ordered Dr. William Allen to examine Ake to determine whether an extended period of observation was required.

Therefore, from the time of his arrest on November 20, 1979, until February 14, 1980, there was no indication of Ake having any mental problem. At trial

Dr. Garcia testified that Ake had no history of mental illness (Tr. 599).⁶

Furthermore, on the day of trial, Ake's attorney withdrew a Motion for Sanity Trial to Determine Present Sanity. At that time the State also produced a cellmate of Ake's who testified that Ake told him that he was going to "play crazy" (Tr. 15). The cellmate also stated that Ake told him he had learned what symptoms to use during his stay at the "nut house" (Tr. 20-23), that he was going to be some kind of an angel (Tr. 20) and made the comment "I'm messing with their minds" (Tr. 20). The cellmate also stated that:

⁶ The court minute of February 20, 1980 reflects that the judge before whom Ake appeared on February 14, 1980, felt that Ake's behavior "may very well be staged for the benefit of the Court, . . ." (R. 20).

"He is sane. He knows what he is doing. He is smart." (Tr. 22).

Ake contends that in this case the United States Constitution requires that the State provide funds for expert psychiatric assistance. It is significant, however, that Ake made no attempt to call any lay witnesses who had knowledge of his mental condition at the time of the murders.

In Oklahoma a lay witness may give his or her opinion as to insanity of the defendant. In High v. State, 401 P.2d 189, 195 (Okl.Cr. 1965) the Court of Criminal Appeals held:

"In Oklahoma, a nonexpert witness may give his opinion as to whether or not a man is insane where it is shown that such witness has had sufficient opportunity for observation of the accused."

See also Wilson v. State, 568 P.2d 1279, 1281 (Okl.Cr. 1977) (" . . . a nonexpert may, upon a showing of sufficient oppor-

tunity to observe, give his opinion as to the defendant's sanity; . . .").

In the present case a number of lay witnesses could have testified as to Ake's sanity. Two such witnesses testified at trial: Dwayne Lucas (Tr. 382-391), for whom Ake worked as a driller, took to work on the morning of the murders, had dinner with on that day, rode around with and then observed Hatch and Ake target practice; and Virginia Keefe, who had known Ake since February or March of 1979 (Tr. 452-453), and who traveled with him from Florida to Louisiana, Texas, Wyoming after the murders and wore the victim's jewelry and used Mrs. Douglass' credit card (Tr. 455-457).⁷

⁷ Ms. Keefe also testified concerning her observation that Ake was

Ms. Keefe was asked no questions by defense concerning her knowledge of Ake's mental status at any time. With regard to Dwayne Lucas, in response to questions by Ake's attorney, Mr. Lucas testified that Ake always came to work promptly (Tr. 390), and that on the day of the murders Ake worked as hard as anyone, and that he did not notice anything strange about him (Tr. 390-391). Lucas stated that at that time he considered Ake to be a friend (Tr. 391), and that he loaned him his car on the day of the murders (Tr. 386, 390-391), a fact corroborated by Ake in his confession (A. 3a).

Ake also failed to call other witnesses who would have had knowledge of

7 (Continued) "scared" when he called his sister and found that the Douglass' children were alive (Tr. 457).

his mental condition at the time of the murders, such as his co-workers, any other acquaintances, or the sister referred to by Virginia Keefe from whom Ake discovered that the Douglass children were alive (Tr. 457).

Additionally, Ake's mother was present and spoke to the Court during the April 10, 1980 competency hearing (p. 12-13). The mother also mentioned that Ake was married (p. 13). Yet neither of those witnesses were called by Ake to testify as to his mental condition at the time of the murders.

Ake's confession also contains references to other persons who could have testified as to his insanity at the time of the crimes. Ake referred to the fact that he was living with a Theresa Colley, who was Hatch's sister (A. 11a-12a). He also related that on the morn-

ing of the murders his father and grandfather helped him move furniture out of his house (A. 3a).

Therefore, Ake produced not one witness who was personally acquainted with him to testify concerning his mental condition at the time of the murders but requests this Court to hold that the State must provide him with expert assistance to attempt to determine his mental state four months earlier.

Ake is asserting that the Constitution compels the State to provide a particular kind of witness, i.e., an expert witness, despite the fact that there were a number of lay witnesses available to testify on the issue of Ake's sanity.

This Court has thus far held that the Sixth Amendment guarantees that a

defendant have compulsory process for obtaining witnesses in his favor. Washington v. Texas, 388 U.S. 14 (1967). In the present case state process was available for Ake to subpoena any witness. Okla Stat. Ann., tit. 22 §§ 707-710 (West Supp. 1979). This included witnesses residing out of county and out of state. Okla. Stat. Ann., tit. 22 §§ 715, 718, 723.⁸ An arrest warrant could also have been issued to insure the presence of witnesses for trial. Okla. Stat. Ann., tit. 22 §§ 274 and 719.

Furthermore, with regard to Ake's claim that he was denied the "necessary

⁸ Okla. Stat. Ann., tit. 22 § 718 provides that all witnesses for criminal defendants who appear pursuant to a subpoena issued on his behalf shall be paid their fees and mileage out of the court fund.

expert assistance," it is to be remembered that the only "assistance" which the Constitution specifically guarantees is the "Assistance of Counsel." Faretta v. California, 422 U.S. 806 (1975).

There is presently no constitutional right to have a psychiatric expert provided to an indigent. United States ex rel. Smith v. Baldi, 344 U.S. 561, 568 (1953). The State complied with all present constitutional mandates concerning the mental status of defendants by having appropriate mental treatment in order for Ake to be competent to understand the nature of the proceedings against him. Drope v. Missouri, 420 U.S. 162 (1975); Dusky v. United States, 362 U.S. 402 (1960). Ake's own attorney declined to avail himself of procedures

to determine competency to stand trial (Tr. 3-4).⁹

The state of mind of a defendant with regard to criminal culpability has long been the province of state court systems. In Powell v. Texas, 392 U.S. 514, 534 (1968) the Court refused to embark upon the course of articulating "a constitutional doctrine of criminal responsibility." In Leland v. Oregon, 343 U.S. 790 (1952) the Court refused to invalidate an Oregon law which placed the burden upon the defendant to prove his insanity at the time of the commission of the crime beyond a reasonable

⁹ Okla. Stat. Ann., tit. 22 §§ 1175.1 et seq. (West Supp. 1983) grants a defendant the right to a jury trial on the issue of competency to stand trial. At the time of the Petitioner's trial the statute granting that right was Okla. Stat. Ann., tit. 22 §§ 1161 et seq. (West 1971).

doubt, despite the fact that Oregon was the only state placing such a burden on a defendant. The continuing validity of Leland has been reaffirmed in recent years. Rivera v. Delaware, 429 U.S. 877 (1976); Patterson v. New York, 432 U.S. 197, 205 (1977).

In his Brief Ake can point to only nineteen states which have a statute for compensation of expert witnesses for the criminal defendants (Brief of Petitioner, p. 25). This is hardly the overwhelming number of states which this Court has used as guidelines in determining constitutional appropriateness in other contexts. Cf. Coker v. Georgia, 433 U.S. 584 (1977) (Georgia only State which imposed death penalty for rape of an adult woman); Leland v. Oregon, supra, 343 U.S. at 798.

Ake also cites the case of Little v. Streater, 452 U.S. 1 (1981). However, that case is clearly distinguishable from the present one. There, Connecticut imposed an "onerous evidentiary rule," 452 U.S. at 14, upon putative fathers in paternity actions in that under Connecticut law a defendant's testimony was insufficient to overcome the plaintiff's (mother's) prima facie case. The Court held that denial of a blood group test to an indigent putative father denied him due process under these circumstances. In addition to the facts of the unfair evidentiary burden placed upon the defendant, the Court found that the unquestioned reliability of the blood grouping test was critical in the finding that the putative indigent was denied due process when the State refused to provide such a test.

In the present case no evidentiary rules existed which placed Ake at a particular disadvantage. Cf. Sandstrom v. Montana, 442 U.S. 510 (1979). The instructions given to the jury placed upon the State the burden of proving beyond a reasonable doubt that Ake was sane at the time of the commission of the crime (R. 142-143, 152-153).

Furthermore, the validity of blood grouping tests is accepted, while the use of an expert witness on the question of sanity is definitely without scientific certainty. One can assume that a jury would regard with skepticism a claim by a psychiatrist or psychologist that Ake was insane at the time of the commission of the crime after his attorney declined to call as witnesses a number of people (parents, grandfather, sister, wife, friends, co-workers, and

employer) who saw him on that day, who knew him well, and who would be expected to be sympathetic toward the idea that Ake was insane when he murdered the Douglasses.

Ake contends in his Brief (p. 23-24) that several Courts of Appeal "have recognized the constitutional necessity of providing expert assistance for indigent criminal defendants in proper cases."¹⁰

¹⁰ The State disagrees with Ake's flat assertion that "eight" Court of Appeals have made this finding. A reading of Burger v. Zant, 718 F.2d 979, 981 (11th Cir. 1983) does not support this contention in any way. United States v. Decoster, 624 F.2d 196, 210 (D.C. Cir. 1976) involved an interpretation of 18 U.S.C. § 3006A. Cf. Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969) (Burger, J.). In Christian v. United States, 398 F.2d 517, 519, n. 7 (10th Cir. 1968), the Tenth Circuit stated only that the denial of an expert "may" in certain circumstances violate the Sixth Amendment. Cf. Watson v. Patterson, 358 F.2d 297, 298 (10th Cir. 1966)

The cases cited by Ake and other cases reveal that the various Courts of Appeal use a case by case method of determining whether due process has been violated. Matlock v. Rose, 731 F.2d 1236, 1243-1244 (6th Cir. 1984) ("At a minimum, there must be a fair factual basis for the defendant's contention that his sanity is in doubt, that that issue must be a substantial one in his defense."); Moore v. Zant, 722 F.2d 640, 648-649 (11th Cir. 1983) (defendant not entitled to his own microscopic experts); Westbrook v. Zant, 704 F.2d 1487, 1496-1497 (11th Cir. 1983) (under the circumstances, defendant in capital cases not entitled psychologist for second stage evidence where friends,

relatives or neighbors could have been subpoenaed to testify); Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir. 1981) ("A psychiatrist is not constitutionally required."); Payne v. Thompson, 622 F.2d 254, 255 (6th Cir. 1980); ("Nor can we find a federal constitutional violation in the state trial court's refusal to provide expert witness and psychiatric examination by witness of his own choosing."); Hoback v. Alabama, 607 F.2d 680, 683 (5th Cir. 1979) (refusal to provide investigative services for defendant did not constitute a denial of due process); Pedrero v. Wainwright, 590 F.2d 1383, 1390-1392 (5th Cir. 1979); Satterfield v. Zahradnick, 572 F.2d 443, 445 (4th Cir. 1978) ("Whatever may be the extent of an indigent's right to an impartial psychiatric evaluation to enable him to place the

issue of insanity before the trial court, see United States ex rel. Smith v. Baldi, [citation omitted], we are of opinion, on authority, that there exists no constitutional right to the appointment of a private psychiatrist of the defendant's own choosing at public expense.").

In Pedrero v. Wainwright, supra, the Fifth Circuit cited the cases of Bush v. McCollum, 231 F.Supp. 560, 565 (N.D. Tex. 1964), aff'd 344 F.2d 672 (5th Cir. 1965) (defendant's sanity at time of the offense must be "seriously in issue") and Brinks v. Alabama, 465 F.2d 446, 449 (5th Cir. 1972) (there must be a "reasonable ground to doubt" the defendant's sanity at the time of the offense) and found that where, among other things, no testimony was offered at the arraignment or trial to suggest

that the defendant "behaved in a strange or irrational manner at the time of the offense," he was not constitutionally entitled to a psychiatric examination. 590 F.2d at 1390-1392. The Court also distinguished that case from the case of Hintz v. Beto, 379 F.2d 937, 941 (5th Cir. 1967) (court used test of whether there was a "fair factual basis" for the question as to the defendant's sanity at the time of the offense) where a defendant who had a history of alcoholism and bizarre behavior, and the circumstances of the offense "tended strongly to speak of his derangement." The Court in Pedrero held that under the facts of that case, defendant's sanity at the time of the crime was not "seriously in issue." 590 F.2d at 1392.

In the present case there was no showing that on the day of the murders

Ake's behavior was in any way bizarre or erratic. The detailed and complete account of the day's activities in his confession also negates any serious question concerning his sanity on the day of the crime. Many details of the confession, such as the account of the murders themselves, the activities of Ake and Hatch on the day of the murders, the locations where the two fled, the telephone call to Ake's sister, Ake and Hatch's association with Virginia Keefe, are corroborated by other witnesses.

The only theory which the facts of the case could rationally support is that at some point approximately four months after the murders Ake became mentally ill. This is not sufficient to support a constitutionally mandated mental examination on the issue of sanity at the time of the offense.

The State concedes that there may be cases in which the denial of funds to conduct examinations or tests requiring expert witnesses would render the trial so fundamentally unfair as to deny due process. Obviously, a State may take some action or refuse to provide an indigent access to a defense which constitutes such a denial. Little v. Streater, supra. But unless a specific provision of the Bill of Rights has been violated, the "fundamental fairness" provision of the Fourteenth Amendment is the determinative guide. Donnelly v. DeChristoforo, 416 U.S. 637, 643-645 (1974); Matlock v. Rose, supra, 731 F.2d at 1244.

Therefore, based on the facts of this case, the State contends that Ake received a fundamentally fair trial and that the absence of expert testimony on

the issue of insanity, in view of the absence of lay witness testimony on the issue of insanity, did not deny him due process of law.

The establishment of a constitutional right to expert testimony on the facts of this case would open a pandora's box with regard to the claims of prisoners, particularly those on death row. Such a decision would surely be held to be retroactive since the addition of an expert witness would be held to "enhance the accuracy of criminal trials." Solem v. Stumes, 104 S.Ct. 1338, 1342 (1984). Obviously, delays in the execution of death sentences would inevitably follow.

Furthermore, the increase of expense to the criminal justice system, which should be considered a governmental interest (which includes the "func-

tion involved and the fiscal and administrative burdens,") under the due process test of Matthews v. Eldridge, 424 U.S. 319, 335 (1976), would be staggering. Virtually every defendant who had a mental problem before or after a crime would claim the right to funds for independent psychiatric examinations to determine if he or she was insane at the time of the crime, or if even a reasonable doubt existed as to sanity, which is the test in Oklahoma. Rogers v. State, 634 P.2d 743, 744 (Okla. Cr. 1981).

Since a "fair factual basis" for Ake's contention that his sanity was in doubt did not exist, Matlock v. Rose, supra, the State asserts that no constitutional error occurred in this regard.

Furthermore, the Oklahoma Court of Criminal Appeals in the present case held that the argument concerning his

alleged right to funds for expert witnesses on this issue was waived by the failure of Ake to raise such in his Motion for New Trial. See, J.A. 71. In Oklahoma, only assignments of error presented in the motion for new trial will be considered on appeal, unless the error complained of is fundamental. Hawkins v. State, 569 P.2d 490, 493 (Okla. Cr. 1977). This is a long-standing rule of criminal procedure in Oklahoma. See, Eads v. State, 640 P.2d 1370, 1371 (Okla. Cr. 1982); Strong v. State, 547 P.2d 383, 385-386 (Okla. Cr. 1976); Hurley v. State, 416 P.2d 967, 971-972 (Okla. Cr. 1966).

Failure to comply with a state procedural rule normally bars federal review of an alleged constitutional error. Engle v. Isaac, 456 U.S. 107 (1982). See also, Estelle v. Williams, 425 U.S.

501, 513-515 (1976) (Powell, J. concurring) (failure to object to appearing in prison garb should act as waiver of constitutional right).

PROPOSITION II

IN A CAPITAL CASE, THE STATE HAS NO DUTY TO ASSIST A CRIMINAL DEFENDANT DISCOVER MITIGATING EVIDENCE; IN THE PRESENT CASE AKE WAS FREE TO INTRODUCE ANY MITIGATING EVIDENCE AND THEREFORE THE CONSTITUTIONAL REQUIREMENTS OF LOCKETT AND EDDINGS WERE COMPLIED WITH.

In Proposition II, Ake contends that the State has a constitutional duty to provide funds to an indigent defendant to enable him to prepare and present evidence in his favor at the sentencing hearing. Ake asserts that he should have been able to attempt to obtain expert psychiatric testimony concerning his mental condition.

The State again notes that Ake failed or refused to call any number of witnesses who had direct knowledge of his mental condition on the day of the murders. Again, there is not a shred of evidence to support Ake's contention that he was insane at the time or was suffering from any mental illness. No witness was called who would say even that Ake was acting in a bizarre or unusual manner at any time contemporaneous with the crime.

To the contrary, Dwayne Lucas testified that there was nothing unusual or strange about Ake on the day of the murders (Tr. 390-391). The State again points to the detailed and explicit confession which contains numerous details corroborated by other witnesses in the case such as Mr. Lucas, the Douglass children and Virginia Keefe.

In Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978) the Supreme Court held that the State could not prevent a defendant from presenting any relevant evidence which would bear on the defendant's sentence in a capital case. The State has not done so here; Ake was free to call any of the numerous witnesses in existence who had knowledge of his mental condition at the time of the crime.¹¹

If the Court rules that Ake is entitled to funds for the hiring of an expert to attempt to discover evidence in mitigation of punishment, there would seem to be no death penalty case in which a State would be free from such a

¹¹ Oklahoma specifically allows a defendant to present evidence as to "any" mitigating circumstances. Okla. Stat. Ann., tit. 21 § 701.10.

burden. Obviously, virtually every murderer suffers from some degree of mental disability or personality disorder and the State should not be constitutionally compelled to pay for an expert who would attempt to uncover a justification for the murderer's conduct.

The State is under no constitutional duty to create exculpatory evidence. Richards v. Solem, 693 F.2d 760, 766 (8th Cir. 1982) ("Although the State has a duty to disclose evidence, it does not have a duty to create evidence.")

Furthermore, Ake had the benefit of three expert witnesses who examined him with regard to his mental competency to stand trial. Dr. Allen, Dr. Garcia, and Dr. Enos all testified concerning his mental condition. The fact that they did not give an opinion as to the sanity

of Ake at the time of the crime is, in the context of the entire case, not a constitutional violation.

In Westbrook v. Zant, supra, 704 F.2d at 1496-1497 the Eleventh Circuit stated that, in a capital case, where the defendant's history of long incarceration was placed before the jury, the defendant himself could have taken the stand in the penalty phase of the trial and introduced mitigating testimony, and "[f]riends, relatives, or neighbors could have been subpoenaed to testify," there was no constitutional error. The Court observed that "[t]he evidence for which Westbrook sought a psychologist could have been demonstrated by other methods." 704 F.2d at 1497.

For these reasons, no constitutional error occurred by the lack of state funding for Ake's attempt to secure

expert witnesses to testify concerning alleged mitigating evidence which he claims could have been discovered.

PROPOSITION III

WHERE AKE'S ATTORNEY WITHDREW HIS MOTION FOR SANITY TRIAL TO DETERMINE PRESENT SANITY AND THUS DID NOT AVAIL HIMSELF OF THE PROCEDURE IN OKLAHOMA FOR DETERMINING COMPETENCY TO STAND TRIAL, HE CANNOT NOW CONTEND THAT HE WAS UNABLE TO COMPREHEND THE PROCEEDINGS AGAINST HIM.

Ake next complains that the prescribed Thorazine dosage prevented him from comprehending the proceedings against him.

As previously noted, Ake's trial attorney withdrew his Motion for Sanity Trial to Determine Present Sanity on the day of trial.

In Oklahoma a defendant in a criminal case has the right to a jury trial on the issue of whether he is competent

to stand trial. Okla. Stat. Ann., tit. 22, §§ 1161 et seq. (West 1971) (Now Okla. Stat. Ann., tit. 22 O.S.1981, §§ 1175.1 et seq. (West 1981); Cox v. State, 644 P.2d 1077, 1078 (Okla. Cr. 1982); Beck v. State, 626 P.2d 327 (Okla. Cr. 1981). Since Ake withdrew the motion for such determination and raised this issue only in closing argument, Ake's contention in this regard is meritless.

This case differs materially from that in Drope v. Missouri, 420 U.S. 162 (1975). In that case the defendant's attorney objected to the case proceeding to trial and requested a psychiatric examination. The trial court overruled a Motion for Continuance on this and another ground.

In the present case Dr. Garcia sent the Court a letter on May 22, 1980,

advising that Ake was "able to adequately consult with an attorney and he does have a rational as well as actual understanding of the proceedings against him." (R. 17).

With regard to the Thorazine, the amount in question which was administered to Ake, 200 milligrams, three times a day, was prescribed by Dr. Garcia. Dr. Garcia is the Chief Forensic Psychiatrist at Eastern State Hospital, which is a State mental hospital in Oklahoma (Tr. 587).

There is nothing in the record or in Ake's Brief to suggest that the amount of Thorazine administered to Ake was excessive. His brief contains only a general attack on the use of Thorazine. The amount prescribed by Dr. Garcia must be considered to be appropriate since its correctness is uncon-

tradicted by anything in the record or in Ake's Brief.

Furthermore, Ake's attorneys took no action to attempt to reduce or halt the amount of Thorazine given to him.

CONCLUSION

For the reasons stated, the State respectfully requests that Ake's conviction and sentence be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

APPENDIX A - STATEMENT OF THE
PETITIONER GIVEN ON NOVEMBER 23, 1979
AND SIGNED ON NOVEMBER 26, 1979.

GS - Greg Shields DS - D.L. Stedman

CANADIAN COUNTY SWORN AFFIDAVIT

STATEMENT OF GLENN BURTON AKE

Q: This will be an interview with Glenn Burton Ake at the Canadian County Sheriff's Office in the Sheriff's Office in El Reno, Oklahoma. My name is D.L. Stedman, Sheriff of Canadian County. Present with me are Agent Greg Shields, OSBI and Mr. Glenn Burton Ake. Glen what is your date of birth?

A: Nineth month, the 8th day of 55.

Q: (DS) Is Glen Burton Ake your true and correct name?

A: Yes it is.

Q: (DS) Do you go by any aliases?

A: Yes I do.

Q: Tell those to me, would you?

A: John Vandenover, its not Johnny like everybody has been saying, Skip Thompson.

Q: (DS) Spell Vandenover for me?

A: V-A-N-D-E-N-O-V-E-R. All one name, no hyphens. The other name I went under was Skip Thompson and I went under that in Casper, Wyoming and Shoshoni, Wyoming. I went under Skip Jenkin that in Louisiana, New Orleans when I was working for Jack Thompson Shows. Billy Williams I used one time for one day

2a

just passing through. The people that I stayed at their house ask my name and that's what I told them. That's all my aliases.

Q: (DS) Okay, Glenn, are you aware that this conversation is being taped?

A: Yes I am.

Q: (DS) Have you agreed to it?

A: Yes I have.

Q: (DS) Okay, let me read you your rights under the Miranda Warning. You have a right to remain silent. Any statements that you make can and will be used in evidence against you. You have a right to consult with and have present prior to and during interrogation an attorney either retained by you or appointed. If you cannot afford an attorney one will be appointed for you prior to any questioning if you so desire. You may stop talking at any time you desire. Do you understand each of these rights that I have explained to you?

A: Yes sir.

Q: (DS) Having these rights in mind do you wish to talk with us now?

A: Yes sir.

Q: (DS) Okay, Glenn in your own words, why don't you start back on October 15th and tell us what happened that day and during the previous days until you were arrested in Colorado.

A: Alright, a, there was one other question that I wanted to ask you. Anyway it started out that morning. I got up and I found out that the girl I was living with, Theresa Colley, was a going out on me, she stayed out all night that night and the night before. And I woke up and I was sort of pissed off. I started drinking before I went to work.

Q: (DS) And this was all on Monday the 15th of October?

A: This was all on Monday. I woke up about 8 o'clock in the morning and started this. I started drinking. At 2 o'clock in the afternoon my crew showed up and she wasn't there still. So I went on ahead and went to work, continued to drink all the way there too. Got there and showed up for work . . . So we decided to get rid of my job, so I left my derick had there, I was short-handed already, left my derick hand to drill, cause the tool pusher said that he could have a drilling job next if I want to get rid of him. So me and Steve borrowed Dewayne's car, Dewayne Lucas, which was my derick hand and he loaned it to us and so we went ahead and went back to Enid, got back to Enid and we was around the house and she still hadn't come around. I tried to find her and I finally located her and I couldn't get in touch with her, she wouldn't talk to me, so she there. So I went ahead and moved all my furniture out of the house, everything I had, called my dad, he called my Grandfather, they both showed up over there, we moved the whole house out. We got the house moved out, I didn't know what I was

going to do, I started looking for her, couldn't find her, finally we just took off. We were going to take the car back out, we had Steve's car there, Steve has a car in Enid, had one, still there probably, somewhere. And we took off and we went out towards the rig, went by the rig, we didn't go exactly by it, went around the section line by it. Went over to this other place, we looked at it, didn't look very promising so we just went on by it. At that time I knew that I couldn't go back by the rig so we just decided to head on down the road and get out of there, we had a little bit of money on us. So we went on, we headed on down the road, I forget which highway it was, we cut over the Hennessey and started coming sought, bought a bunch more booze, whiskey and stuff, started drinking. We got down the highway, it was dark time, I don't know what time it was exactly and we decided to start driving the section lines to see if we could get us, pick us up some more money by doing a burglary or something, you know. We drove up to this one house and we didn't like it so we drove out. We went into two or three houses like that and finally we came to this one house where Mr. Douglass lives. We pulled into the driveway and there was about 6 or 7 Doberman Pinchers met us at the driveway so I went up and made a phone call, played like I was going to make a phone call, went up to the door and she let us in. Well she . . . they didn't let us in the dogs stopped us and they came outside and met us and they let us come in to make a phone call. I said I forgot the phone number in the car and so I went

back to the car to get it, I was pretty scared. I never done . . . all we was going to do was the burglary but the people was home. So we . . . I went back up to the house and played like I was going to make a phone call and told Steve to meet me coming in the door, come on in the door. Steve came up to the door and I pulled out my gun and I said alright, everybody in the livingroom on the floor. Everybody went in the livingroom on the floor. We continued to go on through the house to burglarize the house with the people there and all, that was all we was going to do is burglarize the house. So we came back in the livingroom, we stayed there for about 30 minutes, I guess, searching the place, we had one of the kids show us around to every room, where all the money was, all the little cups of money and everything, trying to get some money. So Steve goes through their wallets, I guess, doesn't find nothing but a credit of Mrs. Douglass. They had bunches of credit cards but nothing was taken except for one Visa car from Mrs. Douglass. Left all his credit cards and everything so people would think nobody took credit cards. So we were all in the living room and it was about time to leave and I told Steve to go outside and get in the car and turn it around and get it ready to go, get it running and ready to go. Steve goes outside and hops in the car and he warns me, he says, "don't do nothing drastic before we leave." I tell him, I say, "don't worry I ain't, don't worry ain't." Finally I got him talked into leaving outside, going outside. He walks outside get in the car turns it around,

starts it up. And I stands by the end of the couch and I unloaded a .357 magnum loaded with .38 wad cutters on these people. I continue to run out the door and the dogs were all barking at me so I slowed down to a walk, walked out the door, I drove off, drove off. Steve asked me what I done and he told me I should of never done nothing like that. So we go on down the road to Arkansas, Ft. Smith, Arkansas. So we decided to get rid of that car that Dewayne Lucas loaned us so we parked it in the back of this motel where we stayed that night. We parked it behind it and left it there and hopped on a bus to Memphis, Tennessee and we decided that we would make a switch in buses and confuse everybody. We switched buses and we went to Memphis and we stayed there at the Ramada Inn for two days where we got ripped out for \$800 but we still had \$900 left. We had \$1700 when we left, before we done any burglaries, but we knew that wasn't going to last . . . Neverthe less, we should of never done any of those serious crimes. We went on down to New Orleans, we got that job, we got that job and we went to work and we worked there for about a week or so and I met this girl, Ginger, I don't know her last name at all now. And we picked her up, Steve told me not to pick her up, not to take her with us but I wouldn't listen to him cause I knew her before, when we lived in Shoshoni with her and she knew me as Skip, that's what everybody while the whole journey was on, was Skip. So we went ahead and worked awhile and she was going to move on the lot with me and they fired me for letting her move on the lot. So we went ahead and left

there headed towards Texas on the bus and we got to Texas. Can I stop for a moment?

Q: (DS) Yes.

A: When we were headed through Texas, we started headed into Texas, we were on the bus we didn't have enough money to ride very far and we were going to stop at that lake, right this, right that side of Texas, still in Louisiana.

Q: (DS) Lake Charles?

A: Lake Charles. Okay we met this guy on the bus and he said he could put us up for the night if we made it to Orange, Texas. The next town away. We had just enough money to get there, we done blow all our money on our travels. So we went ahead and we went to Texas, Orange, Texas, we stayed there the night this man had a wad of money on him you wouldn't believe, about \$2800-\$3000, but he was being real good to us by giving us a place to stay and everything and Steve wanted to go ahead and burglarize it but we didn't. I told him no and I was the main whole thing the whole capers was my brain, whatever I told Steve we didn't do, we didn't do it. So we went ahead and left the next morning with just a few dollars in our pockets and he gave us a ride . . . well we stayed there two days, yeh, two days, and we continued on and he gave us a ride, he wanted to get rid of us out of his house I guess, cause we had already imposed on him two days. He gave us a ride it was about 40 miles from there, about 50 miles or something like that,

where he dropped us off on this road by this park, stopped by this park, went across the street, he dropped us off headed towards 80. We didn't want to head north . . . We was headed north there so we could just go south and cut off on 10. We went down that way, playing cash for all the gas. No one could trace us with the credit card. We get down south on 10 comes on across into New Mexico into Arizona, into Nevada, got up through Nevada, get into the northern part of Nevada and just crossed the border into California and we're low on money. Se we head south again cause there was no cut over from where we were at. So we had to go all the way down south to Barstow, towards Barstow California, where I had a card from that one guy in Texas. I used it in one place. We went on from there, we went on down south, started using that Visa card, Ginger did. Started using that Visa card and went all the way across to California got up through my home town, up through my home town, on through there, went north of there and started headed east again, figured we would throw the patrol again, by heading east. Changed plates three times already by that time, on that car. Then we picked up another set of California plates on that last venture east. So we threw them off cause we didn't want to use that Visa card in the same place all the time. We started headed east and got into Nevada and started blowing all our money. Well I gave Steve the money and he goods with money and he can handle money, I can't, I blow it too much. I gave him \$150 and I kept \$300. We were headed through there and we got

to a place called Battle Mountain and we was gambling in the Casino, he was playing 21 and I was standing at the bar, drinking whiskey. Every time we done this, I had to be all fucked up, everytime I done any shooting I was all fucked up on whiskey. Whiskey makes me nutty, anybody will tell you that, anybody, that's the only time I'm ever rowdy whenever I drink whiskey. We stopped there started driking Whiskey and everything and these guys invited us over for dinner, these young people, they were all bikers and stuff. The kind of people I run around with. I had a leather vest on at the time, levis, Harley Davidson belt buckle, boots, Harley Davidson hat and everything. So they invited us over thinking we were bikers too, you know, So we went over there and we partied there for three days, hand, \$300 worth of whiskey, half gallons, gallons of whiskey, wine, beer, we headed out of there thinking we were getting hot cause the cops were watching us over very close. We headed out of there and headed into Utah on Visa, everything, all our travels were on Visa. We went all over Utah with that Visa card. She just sign the shit right out of it. Spend 3 or 4 thousand dollars on that Visa card in Utah alone. Whatever she wanted to buy and whatever body wanted to buy, we bought with that Visa car, we got com checks with that Visa card and everything. She always kept saying com checks, com checks, that's all she got, she got Visa quick, she got Visa power or what every you want to call it. We headed out of Utah, headed north up to Wyoming. Stayed in Rock Springs one night and headed on

down to Baggs, got to Baggs and I went over and seen a friend of mine I wanted to see. I was going to work on a rig. Was going to keep cool, lay low and no do nothing else wrong cause I didn't do nothing wrong in that state. And here we get into an argument that night at the bar but we wasn't bar hopping. We was drinking all day before then. And we left that night, well we got into an argument and everything in the bar and I wanted to knock the shit out of her but I didn't, didn't ever hurt her, so I busted her glasses, that's just as bad as hurting her cause she can't hardly see very good. So she called the law on me, I guess, told them where I had my 7 mm rifle at. The law, they just went over and got that. And I went over where the law was at, I didn't know they were there, to get that 7 mm rifle. And the laws was standing out on the road around the corner of the block. So when they seen us in there they come around. When they come around they said "Hold it you by the car." And I was outside the car, they couldn't see Steve inside the car. So I took off running on foot. Ran for a little bit around the trailer, they still were standing over there. So I ran back to the car, hopped in the car, backed it out of the driveway and takes off and that's when I headed sought out of Baggs three miles from the border. I comes down south about 18 miles, going about 130 miles an hour on black ice trying to lose them. I couldn't lose them very easy, there lights were back behind about a mile an a half or two miles. So I flipped a huey, slowed down enough where I could flip a huey and I come slidding in the middle

of the road like this here, making a 180. I start coming back, I get back up there and we pass them and he sees what I done and he was already going fast as hell you know, and he couldn't stop and I whipped off on this other road which I knew, cause of an oil field up there that I worked in. Whipped off it and went on down the road quite a ways, went off this one road, parked, turned off all the lights and everything and watched him come back and go right on by and he kept on going until his lights were out of sight. We turned on and came back down that one road where we got caught at. That brings us up to date.

Q: (DS) Okay, Glenn, now that we've gone through that with you in a narrative form telling us, lets go back and start on October 15, which was a Monday. What did you do that first thing on October 15?

A: Woke up and started looking for Theresa.

Q: (DS) Who is Theresa?

A: Theresa Colley was the one that I was living with up there in Enid.

Q: (DS) Is that Steve Hatch's sister?

A: Theresa Colley's maiden name is Theresa Hatch, yes it is.

Q: (DS) Okay, and why was you looking for her?

A: Cause I was living with her and she hadn't been home in two nights in a row and I was made at her and that why I started drinking, and smoking pot.

Q: (GS) Had you had a fight with Theresa the night before she left?

A: No. That's what I couldn't understand, I gave her my whole check and everything. Everything, I just come home. . . . I'd work come home and give her my money, taking care of it, buy the kids what they need everything. I couldn't understand it. That's what I couldn't understand.

Q: (DS) After you couldn't find her, what did you do then?

A: We started drinking. I shot up about half a gram of cocaine, at one time, started smoking pot, looking for her.

Q: (DS) What time of day was that?

A: 9 o'clock in the morning, 10 o'clock in the morning, somewhere around in there.

Q: (DS) Okay, and how long did you look for her?

A: About an hour, that's all I could drive.

Q: (DS) Were you by yourself?

A: No, Steve was with me.

Q: (DS) Steve Hatch?

A: Steve Hatch, well he was with me the last half hour, the first half hour he was gone, I think, he was talking to her.

Q: (DS) Okay, this puts us up to about 10 o'clock, where did you . . . what did you do then?

A: I just kept looking for her, drinking and smoking dope and shooting drugs.

Q: (GS) Where were you at that time?

A: In my house.

Q: (GS) And where was that?

A: 2112 West Pine, Enid, Oklahoma.

Q: (DS) Okay, what time did you leave the house then?

A: About 2 o'clock.

Q: (DS) Who did you lave with?

A: My derick hand came to pick us up.

Q: Who is he? (DS)

A: Dewayne Lucas.

Q: (DS) Okay, your derick hand?

A: He was my derick hand, yes.

Q: (DS) Okay, what did you do for a living.

A: I was a driller on a oil rig, working for Sarah Drilling Company.

Q: (DS) Where at.

A: Hennessey Highway and the Drummond Highway, right at that corner.

Q: (DS) That would be west of Hennessey?

A: West of Hennessey, south of Drummond, all the way to the Hennessey highway.

Q: (DS) How did you leave?

A: In his car, he was driving, I couldn't drive.

Q: (DS) Was anyone else with you?

A: Steve Hatch was.

Q: (DS) Okay, what kind of car did Dewayne Lucas have?

A: 64 Malibu.

Q: (DS) Do you remember the color?

A: It was yellow with a lot of primer spots on it. Banana yellow, light yellow, lighter than banana, like a real faded out banana.

Q: (DS) And you said this was about 2 o'clock?

A: About 2:30 or something like that.

Q: (DS) Where did you go?

A: Went to the rig.

Q: (DS) Okay, did you do anything on the way to the rig?

A: Okay, drank beer and whiskey. Soon as we get to the rig, I could make it up to the dog house and change clothes, that's all that I could do. . . . that's when we borrowed the car and left.

Q: (DS) Glenn do you, are you an outdoors man?

A: Yes I am.

Q: (DS) Do you like guns and hunt quite abit?

A: No.

Q: (DS) You don't hunt much?

A: I've never went hunting at all.

Q: (DS) Is that right?

A: I lugged guns while I was in the army. I was an expert. I like tearing them apart and working on them and putting them back together.

Q: (DS) Did you own a gun at that time?

A: That day, yes I did.

Q: (DS) What was it?

A: .357 magnum.

Q: (DS) Where was that gun at that time?

A: It was in the car, in my lunch box. I was going to take it out to the rig and practice shot with it.

Q: Did you?

A: No.. I went out and bought a whole box of shells but I never shot them.

Q: (GS) When did you buy shells?

A: The day before, the 14th.

Q: (GS) Where did you buy these shells?

A: K-Mart, in Enid, Oklahoma. They had no .357 rounds at all.

Q: (GS) What type shells did you buy?

A: .38 wad cutters. .38 Special Wad cutters. They said they would shoot through the gun but they would leave a lead build up so I bought a wire brush and a cleaner so I could clean the barrel every time I fired 6 shots through it, which I did. I practice shot with it quite a few times before we went out that night?

(GS) Q: Where did you practice shooting?

A: I practice shooting at the reserve pits. Cross reserve pits, that's an oil rig about. . .-

(end of tape)

Q: (DS) This will be the beginning of side two.

A: I was practice shooting, I practiced about 12 rounds at the Cross reserve pit. About 150 yards and I could hit a coke bottle with it at that range. Pretty damn good.

Q: (GS) Where was this reserve pit located?

A: The one we practiced on. It was back towards Drummond and behind Waukomis. It was back northwest, where a rig had just moved off location. There was nobody on it. I went in there and I was just practice shooting. There was no houses around in site or nothing.

Q: (DS) Was this that day?

A: That day.

Q: (DS) What were you shooting at?

A: Coke bottles, coke cans.

Q: (GS) Who was present with you?

A: Me and Steve, period.

Q: (DS) Was this before you went to work?

A: No this was after we went to work and after we took off. It was before I moved. We had practiced about 15 shots before we went home, before I moved.

Q: (DS) Did you do any practicing before you went to work when Dwayne was with you?

A: Nope. I showed him the gun and everything but we never shot it. Cause I just had bought it?

Q: (GS) Where did you buy the gun?

A: I bought it off another guy. I was drinking in a bar in Lahoma and that guy was talking about him having a bunch of guns and stuff and he said he had a .357 for sale and I told him I would buy it and we went out to his house that night and we were drunk and I bought it.

Q: (DS) When was this?

A: Around the 13th.

Q: (GS) Do you know his name?

A: No I don't.

Q: (DS) What kind of gun was it?

A: .357 magnum, Ruger.

Q: (DS) Ruger, .357. Can you describe the gun to us?

A: Just a regular .357, blue on one side was tarnished.

Q: (DS) It was blue steel?

A: It was blue steel, yes, but the blue on it on one side was bad.

Q: (DS) How long a barrel did it have?

A: Maybe about 3", 3½", I don't know exactly.

Q: (DS) How much did you give the man for the gun?

A: Gave him \$125. I sold it for \$50 when I sold it.

Q: (GS) Where did you sell it at?

A: Louisiana.

Q: (GS) Who did you sell the gun to?

A: A guy who picked us up hitch hiking. I don't know who he is, what, and where. I know where he is located now, 5 miles south of New Orleans somewhere.

Q: (GS) How could you locate him?

A: Couldn't. Not now.

Q: (GS) Is this where the man picked you up?

A: No, he picked us up down by, Homa, Louisiana, south of New Orleans about 40 miles or so. We were hitch hiking. We didn't have no money to catch a bus. So I sold him that gun so we could have some money. I seen a carnival along the way back towards where he was taking us and I had him drop us off so we went and got a job right quick cause I knew how to talk carney talk. I knew it when I was 14, 13 years old as a run away from home.

Q: (DS) Okay, lets back up to on your way to work. You were telling me you did not do any practicing on your way to work that day.

A: Nope.

Q: (DS) Okay, what time did you get to work?

A: 5 minutes to 3, Right on relief.

Q: (DS) And that's when you relieved the day light tower?

A: That's when we relived, every day, between a quarter tell and 3 o'clock on the money, we relieved them everyday. I've always been on time to work and everything, never been late, always showed up 7 day a week job and all.

Q: (GS) And how long were you at the rig?

A: About an hour, I guess, if that long, I don't know how long, I know it wasn't over an hour.

Q: (DS) This was the 15th of October, was that pay day?

A: I think we got paid the day before. No we got paid Friday and that was Monday. We got paid on Friday before then. They still owe me a weeks check. I'd like to get that so I could give it to my parents too.

Q: (DS) When you left the rig. How did you leave?

A: By Dwayne Lucas' car, he loaned it to us.

Q: (DS) And who left with you?

A: Me and Steve.

Q: (DS) What did you tell Dwayne Lucas that you were going to do?

A: Take the car to Enid and that we would bring the car back to him. Told him that I was going to move and get the hell out of Dodge.

Q: (DS) And you took Dwayne's car and went to Enid? (GS) What did you do when you first got back to Enid?

A: I started looking for her and I couldn't find her cause I knew she had a key to the place. Then I called my parents to move and we got everything moved out within 45 minutes. We moved kitchen set all the utensils, the living room set, couches, TV's stereos, hanging lamps, everything, bedroom set, bunk beds and everything out of the bathroom. That's everything I own.

Q: (DS) And who took that, your parents?

A: Its at my parents house now. I gave it to them to take there.

Q: (DS) Okay, last night, you made a phone call to your mother. Is that stuff the stuff that you told her to sell?

A: Yes. And I'd like to call her back and tell her not to sell it. Cause i'm doing this and I'd like to give it to my nephew when he gets older, cause it was plush stuff.

Q: (DS) Okay, after you parents left with the stuff and was moved over to there house, what did you and Steve do?

A: We decided to take the car back out there and on the way back out there we decided that we didn't have no transportation so we decided to take the car to Arkansas until we could get on the bus, which we had money.

Q: (GS) Did you have the money in your pocket?

A: Yes I had money in my pocket. I had that whole check, cause I never gave her that check cause I found out she was going out on me on Thursday.

Q: (DS) Did you have any other money on you, other than your check.

A: no.

Q: (DS) Did Steve have any other money on him other than what he got from his check?

A: No. Not at that time.

Q: (DS) Okay, you did not go write a check or go to the bank and get any money or anything?

A: Oh, yes we did, we went and drawed out our savings accounts.

Q: (DS) Where was that at?

A: That was at Northwest Enid, Northwest Bank of Enid.

Q: (DS) How much money did you get there, Glenn?

A: Hundred Dollars, I think, or something like that, I don't know what it was, I forget.

Q: (DS) Did Steve get any money there?

A: He got his money he had there too.

Q: (DS) Do you know how much that is?

A: I think it was around the same amount I had, it might have been 50 apiece, I don't know. It was either \$50 apiece or 100 apiece we had in there.

Q: (DS) Did you get that money out of a checking account or a savings account?

A: Savings account under our aliases.

Q: (DS) And what was that?

A: John Vandover and Steve Lisenbee. That was John Vandover and not Johnny. I never have used Johnny.

Q: (DS) Okay, when you started to leave Enid, did you do anything in Enid before you left?

A: Looked for her and that was it. That's all we did man.

Q: (GS) What time did you leave Enid?

A: I don't know it was in the afternoon sometime. Evening around 5 o'clock, 5:30 maybe 6. Somewhere around there.

Q: (DS) Okay, where did you go from there?

A: Headed towards the rig.

Q: (DS) The rig that you worked on?

A: Right to take his car back there but we decided right at the last moment that we weren't going to take his car back.

Q: (GS) After you left Hennessey what is the first town that you come to.

A: I don't know, to tell you the truth, I was drunk and I don't know where we were at. I wasn't driving, Steve was.

Q: (GS) Do you remember stopping any place?

A: We stopped in Hennessey to get some beer, south of Hennessey to get some beer to drink. That's it. Love's Country Store or what ever it was, south of Hennessey. Stopped there and got some beer, we had three cases of beer in the back.

Q: Okay, were you on Highway 81 at this time.

A: I think so, I'm not for sure.

Q: (DS) Where did you go from there Glenn?

A: South to these other peoples house. We went around looking for other places but nothing looked any good.

Q: (DS) Okay, if you were going south on 81 did you go through Kingfisher?

A: I guess so.

Q: (DS) Did you stop in Kingfisher?

A: Maybe to get gas. No we gased up at Love's Country Store. We didn't stop in Kingfisher, I don't think. I don't know, I was wiped out.

Q: (DS) Did you a. . . .

A: All I remember are the high points of that night.

Q: (DS) Do you remember going through Okarche?

A: When we went through, I slept most of the time except when we were looking at houses. I was getting ready to look at this house and I'd say, "no, no, no". And finally we came to that one house and he kept bugging me and bugging me to look at houses and I finally said, "pull in this one."

Q: (DS) Who kept bugging you, Steve?

A: Yeh. He kept looking at the ones with no lights on and everything.

Q: (GS) Did this house have lights on?

A: Yeh, the one I said pull in to, sure did, had a whole family in it. The Douglass family.

Q: (DS) Could you tell us where that house is?

A: To tell you the truth, I can't, can't tell you how to get to it or nothing. All I know is that it's not far from the highway.

Q: (DS) How far from the highway?

A: I don't know but its' not very far cause it didn't take us very long to get back on the highway.

Q: (GS) What would you guess it would be?

A: Quarter of a mile, not very far. I don't know for sure but I don't think it was very far from the highway.

Q: (DS) Is it on a country road, section line?

A: Dirt road, yeh. Section line.

Q: (DS) Which side of the section line is it on?

A: If you're headed east I think, its on the right had side. On the south side of the road. I'm I right, south side of the road, if you're headed . . . yeh, south side of the section line, I'm pretty sure.

Q: (DS) Okay, did you pull in the driveway?

A: Cause I don't know which way we were headed. I think we were headed, east or west when we pulled in. Yeh, we pulled right in the driveway and I told Steve, "pull right into driveway [sic], pull right up like you're going to make a phone call."

Q: (DS) How long was the driveway?

A: Pretty good driveway, I guess, I think.

Q: (DS) Straight or curved?

A: I think, it was straight with a small curve at the end. I think.

Q: (DS) Can you describe the house to us?

A: No, I sure can't. All I seen was 6 Doberman Pinchers or so.

Q: (DS) Was it frame, brick, one story, two story?

A: I think it was one story, with a part with two story in it. In fact, yeh, I know it had to be part of a two story, it had to be, because I remember going down stairs and there was a little room there and that was it. Downstairs, I think.

Q: (DS) Okay when you pulled up into the driveway and parked, where did you park?

A: Right in front of the garage door.

Q: (GS) Was there any other vehicles?

A: Yeh.

Q: (GS) Could you describe them?

A: One was in the drive, I don't know what they was, there was two vehicles there.

Q: (DS) Do you know what kind they were?

A: I don't know, I was pretty messed up whenever I was going in there, I was scared off my ass. Cause I never done nothing like that with people home, no burglaries, I didn't know what I was going to do.

Q: (DS) Who got out of the car first?

A: Me. I told Steve to set in it.

Q: (DS) And what did you do when you got out of the car?

A: I went up to make a phone call. When I seen they were going to let me make a phone call I told them I had to go back out to the car and get the number.

Q: (DS) Was the dogs barking?

A: Severly.

Q: (GS) Who answered the door?

A: A, I never went to the door, I went by the corner of the garage and I stopped and a girl and a boy came out.

Q: (GS) What did you say the girl and boy?

A: I said, "We need to make a phone call; we're lost. I'm trying to find a friend of mine."

Q: (GS) Who did you ask for?

A: Nobody. I don't remember who I asked for.

Q: (GS) Did you ask for anybody in particular?

A: Yeah, I asked for some Joe Blow or something, you know, some off the wall name. Just the first two names that caught in my head. Tom Brown or William McKoney or something, you know. Just anything that would pop up.

Q: (DS) But you don't remember what those names were?

A: I don't remember what I asked for, no.

Q: (DS) What did they tell you?

A: They said, "Yeah, you can come on in and use the phone." So I went in and seen there was a phone and I said, "I got to go get the numbers," so I walked back out to the car and told Steve to come on it as soon as I get inside and everything. So I walked back up and the dogs let us in at that time because the people had done told them it was all right, right? So we went back up to the door and I had a 357 stuck in my belt and my shirt on top of it and then I got

to the phone and picked it up and started dialing some numbers, just any numbers, and I don't know what numbers it was. I looked at the prefix and dialed those first three numbers of the prefix and dialed four more numbers, put the receiver down so it would disconnect, pretending like I was talking to somebody and I was looking at the door all the time to see if Steve come up and as soon as Steve come up, the man of the house, like that, and then I whipped it out, hung the phone up. And I said, "All right, everybody in the living room." I was the top of all the whole thing. I done all the talking and everything of the whole bit. I was pretending like I was a crazy man from the funny farm which I was just about at because I was all fucked up on whiskey.

Q: (GS) Did ;you tell them that you were crazy?

A: Yes.

Q: (GS) What did you tell them?

A: I told them I just out of of Ft. Supply. "I'm crazy, you better do what I say."

Q: (DS) And then what did you do, Glenn?

A: Made them all lay down; tied them up and started going through the house. Covered their heads up.

Q: (DS) Was Steve in the house at that time?

A: Yeah, at that time he was.

Q: (DS) Did he bring the shotgun in with him?

A: Uh-huh. It was unloaded; didn't have no shells in it.

Q: (DS) Was it?

A: Can't shoot nobody with an unloaded gun.

Q: (GS) What was Steve's job when he got into the house?

A: He was to go through everything; that's all he was good at. He was good at that. Going through jewelry boxes and stuff. Or finding hard to spot things, you know, losing stuff; like where people stash money and stuff. He was pretty fair at that but even though, he didn't find no money.

Q: (DS) You told us earlier that you-- that you wore gloves. Did you both have gloves on at this time?

A: Yeah, he did. I didn't at that time. As soon as I hung up the phone and got them all in the living room, I put the gloves on. And I think I wiped the phone off and I went out and yanked all the phone wires out of all the phones; the receiver parts, went through all those and yanked out all those.

Q: (DS) You did all that. You say Steve didn't yank any phones out?

A: He might have yanked out one, I don't know. He might have found one that I didn't, I don't know. I found two or three though I did in that house.

Q: (DS) Were all four of the people laying on the floor?

A: Uh-huh.

Q: (DS) Where at in the house?

A: In the living room.

Q: (DS) Can you tell us where in the living room?

A: In front of the couch. One right in front of the couch; coffee table separating Mrs. and Mister and the girl was behind the man and the body was up by the fireplace laying lengthways from the other ones.

Q: (DS) Okay, Glenn, at what point did you tie them up?

A: At that point as soon as I got them laid down.

Q: (GS) Did you tie all four of the people up?

A: I tied everybody.

Q: (DS) What did you tie them up with?

A: Rope, cords, anything I could find.

Q: (GS) Where did you find the rope and cords?

A: Kitchen. I asked Mrs. Douglass where there was any twine or any rope or anything before I had her lay down. She gave it to me. Is there any way I can get some water?

Q: (GS) Why don't we go ahead and continue this and I'll get you some water.

Q: (DS) Okay. While you were -- where did you end up getting the cords and stuff, did you say?

A: At the kitchen.

Q: (DS) Can you tell me what kind of cord it was and where it came from?

A: Nylon cord and I don't know where it came from in the kitchen.

Q: (DS) You say you bound all four of them?

A: Yes.

Q: (DS) Did you gag the people?

A: Yes, some of them. Yes, I did.

Q: (DS) What with, Glenn?

A: Pieces of cloth, anything I could find. Pieces of cloth, I think most all of them. I think it was all of them, pieces of cloth.

Q: (DS) Did any of the family go through the house with you?

A: Yes, I told the daughter to get up and find us all the money spots.

Q: (DS) This was before you bound her?

A: Right.

Q: (DS) Who went through the house with her? You or Steve?

A: Me. She gave us all -- she found us -- she went through the rooms, she showed up where all the money was and we had her get back in the living room and laid her down. Was trying to get in a hurry because we already took took much time.

Q: (DS) Where was Steve while you were going through the house with her?

A: In the living room.

Q: (DS) What was he doing?

A: He was looking through all the things in the living room and went into the other bedroom and looked for things. In the parent's bedroom.

Q: (DS) And the man and the woman and the boy were tied in the living room floor and the girl was with you?

A: For about fifteen minutes and then she was tied up.

Q: (DS) At any time did you assault or attempt to sexually assault the woman or the girl?

A: No, just tied them up.

Q: (DS) Okay.

A: All we wanted was the money.

Q: (DS) Did you take anything else, Glenn?

A: Just the watch.

Q: Did you take anything other than the watches? (DS)

A: All the change they had. There was one big old cup of quarters and nickles and dimes.

Q: (DS) Can you describe the watched to me?

A: Both of them were Seiko watches; blue face on one and white face on the other.

Q: (DS) Both of them men's watched or --

A: Both of them men's watches, yes. No woman's watch. Yes, there was -- no, there wasn't no woman's watch.

Q: (GS) Was there any other jewelry taken? (DS) Rings, necklaces?

A: Oh, yeah, two rings. Matching set, gold bands with red stones in them all the way around.

Q: (DS) How many stones you think?

A: Eight a piece or something like that.

Q: (DS) Okay. Where were those taken from?

A: I don't know. Steve got those. Maybe they were out of the master bedroom because they were a matched set so I would imagine they came out of the master bedroom.

Q: (DS) Back up just a little bit, Glenn, when you first went into the house or you both went into the house, where were the people in the house?

A: Mother was in the kitchen. The daughter was in the living room. The boy was in the living and the man was in the living room -- bedroom.

Q: (DS) In the bedroom? Master bedroom?

A: When he came out though was just about whenever Steve cocked it through the door.

Q: (DS) Okay, after you go through the house with the girl, what do you do then?

A: Take her back in the living room and tie her up and told Steve to go outside and turn the car around.

Q: (DS) And let me understand correctly. You've told us they are all four tied up in the floor and. . . . (End of tape two) (Beginning of tape three)

A: Gagged.

Q: (DS) Were they covered up with anything or . . .

A: Their heads.

Q: What with?

A: Shirts, whatever we could find.
Cloth.

Q: (GS) Who covered the heads?

A: Steve covered the heads.

Q: (GS) On all or part of them?

A: (Part of them and I covered part of them. I covered two and he covered two. He covered the boy and the mom and I covered the man and daughter.

Q: (DS) Okay, what did you do after you covered them up?

A: Looked through the house for about another two minutes or so. I spent too much time there so I told him to go out and turn the car around and he told me not to do anything that drastic, right, we're already in bad enough. I told him to go turn around the car and don't worry about it. I wouldn't do nothing, so he went out and started the car up and turned around and he head me shoot.

Q: (GS) What was the conversation that you had with the family? Were you talking to them?

A: Yeh. (Affirmative) I told them I was a crazy man.

Q: (GS) What were they saying to you?

A: Uh, they was just saying don't shoot us. That's it.

Q: (DS) Did you make any threats to them?

A: I said just be quiet or I'll shoot you.

Q: (DS) Did you know that the man was a preacher?

A: No, I didn't.

Q: (DS) Did anyone there tell you that he was a preacher?

A: Uh, no, they didn't tell me that.

Q: Okay, Glenn, did you make any threats to any one person?

A: No, I told them all, all the same.

Q: Okay.

A: All were in the same room when I was threatening. All in that room.

Q: (DS) Okay, after you told Glenn, excuse me, when you told Steve to go outside, did he go outside?

A: He hesitated for a few minutes, trying to calm me down because I was all spaced out. I was all fucked up on this, I done a bunch of speed in the car before we got there. Drinking whiskey and speed, they don't mix. He was trying to calm me out of it. Telling me come on, come on, lets get the fuck out of here, come on. I said just

go out and turn the car around and shut up. So he went out and he turned the car around and shut up.

Q: (DS) How long was he in the car before you went out?

A: Three or four minutes.

Q: (DS) What did you do after he went outside?

A: Told the people, I says, I'm sorry but dead men don't talk. And then I emptied out six shots.

Q: (DS) Out of what?

A: .357 magnum, 38 special wad cutter shells.

Q: Okay, and who did you shoot first?

A: The man, the body, the daughter, the mom, the man again, and I can't, I think I shot the boy twice.

Q: (DS) But you don't remember for sure?

A: I don't where I put that last shot. I was all fucked up.

Q: (DS) Okay, and then after you shot them what did you do then?

A: Ran out the door.

Q: (DS) When you ran out the door. .

A: I slowed down and stopped because of all the dogs right there.

Q: (DS) Okay, but when you ran out the door did you think that all four people were dead?

A: I didn't know. I didn't think so. I thought I just hurt them bad enough, I tied them loose enough to where they could get away, but not right away. I wasn't intending to kill them all, I just wanted to hurt them where we could get out of state for awhile. We was pretty close to the stateline, we headed straight east. I didn't know they was dead or not. I was just saying that.

Q: (DS) Okay, you ran out the door...

A: All I wanted to do was hurt them bad enough to get out of the state.

Q: (DS) You ran out the door and you slowed down because the dogs were barking.

A: Uh-uh (affirmative). There was six Doberman Pinchers, or a bunch of them anyway. I don't know how many, there was a whole bunch of them.

Q: (DS) Then what did you do?

A: That's when I hopped, I walked the rest of the way to the car, got about six foot from the door and ran out to the car. I said get the hell out of here.

Q: (DS) Who drove?

A: STEVE drove. He already had the car started and I told him that I couldn't drive.

Q: (DS) And. . .

A: I was too tired. I was like shaking like a leaf and I was all spaced out.

Q: (DS) And when you left, where did you go from there?

A: Went down the driveway and out and was on the highway before long. I know that. We was headed south.

Q: (DS) Did you know what highway that was?

A: We was on a dirt road before then. We came in from a different direction.

Q: (GS) What was the first thing you remember seeing after leaving the house?

A: The birdges. A wood bridge, a small one, real small, two foot on the sides.

Q: (DS) Was that before you got to the highway.

A: Yeah. Like a big creek or something. Right, just a rail, just a little guard rail, I wouldn't call it a bridge, little guard rails.

Q: (DS) Okay, after you got to the highway which direction did you turn?

A: We turned left. I think it was south.

Q: (DS) Okay.

A: Cause we ended up coming out of the south.

Q: (DS) Okay, where did you go from there?

A: Oklahoma City. Through Oklahoma City and we was worried about getting busted being in that car. And we went straight west across the border into Fort Smith.

Q: (DS) Straight west?

A: East. Excuse me.

Q: (DS) On what highway?

A: I think it was eighty. I sure it was eighty.

Q: (DS) Did you make any stops in Oklahoma City?

A: Nope. No stops. Straight through. We had gas.

Q: (DS) Did you make any stops between Oklahoma City and Fort Smith?

A: Rest stop. Take a piss. We stopped two or three times to do that. Not at just rest stops but just off the side of the road. And I was drinking pretty heavy. And that's against the law.

Q: (GS) What were you drinking at that time?

A: Boiler makers. Whiskey and beer, half and half. Half a can of beer and a half a can of whiskey. Canadian whiskey. Canadian Lord Calvert. Same thing I was drinking before we got there.

Q: (GS) Baking up just a moment, were you smoking cigarettes at the time?

A: Smoking cigarettes, smoking pot, shooting drugs, I was doing everything.

Q: (GS) What type of cigarette do you normally smoke?

A: Camel filter light.

Q: (GS) Do you know what STEVE normally smokes?

A: Marlboro's. But I, I ran out that night once. I had to borrow some of his to. He smokes Marlboro normally. But I was smoking his anyway. Cause I was forgetting mine in the car and smoking his in the house. I think maybe I brought one or something like that on me. I was smoking, I used to smoke Raleigh filter Kings.

Q: (GS) Do you remember. . .

A: But I forget what kind of cigarettes I had with me that night cause I don't know. I don't know. All I know is that I was smoking.

Q: (DS) What kind of beer do you usually drink, GLENN?

A: Uh, Bud, Michelog, Lowenbrow.

Q: (DS) Anything?

A: Anything that's got, anything that's good. Any thing that Anhuser Busch usually.

Q: (DS) What kind does STEVE usually drink?

A: Anything that I drink. He usually goes along. . . . I used to drink a lot of Oil Milwaukee up there in Enid. A lot of it. A case and a half a day. It took about, oh, a good two six-packs to get me fucked up on beer. That's why I was drinking whiskey. Alot of the two. Whiskey and beer both.

Q: (DS) Okay, while we're backed up here, do you recall what you were wearing that day?

A: I was wearing a red construction company baseball cap, a blue shirt, a T-shirt shirt, that said on the side of it, in that little sign right here, with two fingers pointing like that, it said I'll show you mine, no, you show me your's and I'll show you mine, or show me yours and I'll show you mine, or something like that it said on it. Had levi pants on.

Q: (GS) What type of shoes?

A: Boots. My boots, The boots that's out here.

Q: (DS) What kind of boots are those?

A: Wolverines. They stink. Don't ever buy any. Feet sweat in them too much.

Q: (DS) What color are they?

A: Black.

Q: (DS) What was STEVE wearing that night?

A: I don't have the foggiest. I think he was wearing a flannel shirt.

Q: (DS) But you don't remember.

A: I don't remember what the hell it was. Cause I know that I got rid of that blue shirt and that hat.

Q: (DS) You said that you had on a red construction company hat.

A: Hat on, right.

Q: (DS) Do you remember what it said?

A: Red Construction Company.

Q: (GS) Where did you discard your clothing?

A: Uh, Tennessee, no, New Orleans. I got to New Orleans, that baseball cap is probably still there. And, uh, uh JACK THOMPSON's trailer bunk house.

Q: (DS) Okay, you stopped two or three times between Oklahoma City and Fort Smith to use the bathroom.

A: A: No bathrooms. We just pissed on the side of the road.

Q: (DS) Okay. When you got to Fort Smith, what did you do?

A: Rented a motel.

Q: (DS) Remember the name of the motel?

A: No, but it's across from the Ford place. It was across from the Ford place. I still got the card in my wallet from the Ford place.

Q: (DS) Do you remember anything else that it was close to?

A: Uh, shopping center. A small shopping center. In fact the parking lot combined with it.

Q: (DS) If I named some motels to you do you think you could remember the name of it?

A: No.

Q: (DS) What time of day was it when you got to the motel?

A: Late.

Q: (GS) What would be your best guess as to the time?

A: I wouldn't have the foggiest, to tell you the truth. STEVE went in and rented it. I had to stay in the car because I was to fucked up. Then he helped me, it was an upstairs too, cause he had to help me upstairs too.

Q: (DS) Do you remember the number of the room?

A: Two forty-three, I don't know for sure. I think it was somewhere around there through. I was in the back, way back. It was a big motel.

Q: (DS) Okay. How long did you stay there?

A: That night. The next morning we got on the bus.

Q: (GS) Which bus did you take?

A: Greyhound.

Q: (GS) Where did you go?

A: From there to Memphis.

Q: (GS) And where was the first place you went when you got to Memphis?

A: Ramada Inn.

Q: (DS) Before we leave there, how did you get from the hotel to the bus?

A: Taxi cab.

Q: (DS) What kind of taxi cab?

A: Brown taxi. It was a brown colored taxi cab but it was called Black Taxi Cab, or something like that.

Q: (DS) What did you do with the car that you went there in?

A: Left right at the motel.

Q: (DS) Was this DEWAYNE LUCAS' car that you left there at the motel?

A: Yes, it was. That's probably how you can find out what motel it was.

Q: (DS) Okay. What time did you catch the bus?

A: Eleven o'clock in the morning. I was half way straight by that time. Eleven o'clock in the morning, I think. Somewhere around then.

Q: (GS) What type baggage were you carrying with you at that time?

A: Duffle bag. That's it.

Q: (DS) What did STEVE have with him.

A: Duffle bag. Some duffle bags that was in the back of that car in Colorado.

Q: (DS) Do you have everything that you had with you in the duffle bags?

A: Right.

Q: (DS) Where was the pistol at this time, GLENN?

A: In the duffle bag. Wrapped up in the sleeping bag. Unloaded.

Q: (DS) Where was the shotgun at this time?

A: Wrapped up in STEVE's sleeping bags, unloaded. Well, his was wrapped up, but the end of it was sticking out of the sleeping bag. Cause one of the trucks seen was the end of the barrel, one of the bus drivers did by throwing it around. That's why we didn't take an airplane. Cause on an airplane they search for weapons. In and on from top to bottom. . That's why we took a bus.

We were scared every through every town we went through. Scared that there would be another, bunch of cops waiting there for us.

Q: (DS) Okay, after you got on the bus at Fort Smith, you had bought a ticket, I believe you said to Memphis, is that right?

A: Yeah.

Q: (DS) Did the bus make any stops between Fort Smith and Memphis?

A: Lots of time.

Q: (DS) Did you ever get off the bus anywhere?

A: No.

Q: (DS) Did STEVE ever get off the bus anywhere?

A: No.

Q: (DS) So, you went directly to Memphis?

A: Right. Well, we got off the bus at one time at one place. And I ran about six blocks to get a bottle of whiskey cause I had the shakes.

Q: (DS) Do you remember where this was?

A: I don't remember what town it was. I know, I seen a liquor store as you pull right up into the bus station. So, I ran back and bought a half gallon of

whiskey. Went back to the bus. Started drinking it and got calmed down a little bit and went to the bathroom and shot some more drugs up.

Q: (DS) On the bus?

A: On the bus. By the water container is where I done it. About a thousand points. A thousand syringe needles. With one glass syringe. I didn't need help to shoot up. I shot it by myself one time. Then when STEVE shot up I shot him up. Cause I was good with a needle.

Q: (DS) Was STEVE shot us this day?

A: Yeah, I think so.

Q: (DS) Was he shot up on the fifteenth, the day you pulled the

A: Yeah, sure was. We had about six grams of cocaine, about ten grams of speed, and quarter pound of pot at that time, before we took off from Enid, which we got from a local, which I rather not say, because he is ont of the big dealers there.

Q: (DS) You say that you don't want to say?

A: Right. He is the biggest around Enid. He is one of the only ones that can get dope from California and bring it in and sell it for little bit or nothing.

Q: (DS) Does he live in Enid.

A: I'd rather not say.

Q: Okay.

A: He lives in, in the, he sells to Enid, let's put it that way.

Q: (DS) Okay, you got to your whiskey and rode the bus on to Memphis, what did you do when you got to Memphis?

A: We went across the street to get, got a motel cause we was all fucked up at the time we got there.

Q: (DS) Just across the street.

A: Just across the street.

Q: (DS) There was a motel right there?

A: Right. And then there was a bunch of cops came to that bus station and surrounded it and we thought they was after us. Which they might have been. We don't know who they was after. We was across the street, the third floor, in the Ramada Inn, looking out the window watching them do this. Two days.

Q: (DS) It was a Ramada Inn that you stayed at in Memphis?

A: Right.

Q: (DS) Right there at the bus station?

A: Right across the street, about a block down from, about a block.

Q: (DS) Do you remember what room you stayed in?

A: Third floor. I don't know what number it was. It was an end room closest to, it was the east end room closest to the road, third story. Had a read sexy looking bartender. Nothing but a hooker.

Q: (GS) What did you do while you were in Memphis?

A: Scored some drugs and stuff. We met this taxi cab driver who got a couple of hookers. Lost four hundred bucks from those hookers. And partied like a son of a bitch. Drank twenty-five Singapore slings the first night, a piece, on top of what we had.

Q: (DS) Where at?

A: At, uh, the room. And at, uh, oh, one of those topless joints. By Annie Fannie's Place, it's called the Library. The Library. You know, at Annie Fannie's we had the Singapore slings. At the Library we finished up drinking beer.

Q: (DS) What were you paying for all this with?

A: Cash.

Q: (DS) Did you you run a tab until you got ready to lave every where you went?

A: Nope.

Q: (DS) Paid for it each time you had a drink?

A: Each drink.

Q: (DS) Did you do any drinking at the club at the Ramada Inn?

A: Yeah. Singapore slings. We ran a tab there and then paid it up.

Q: (DS) Do you remember how much your tab was that night?

A: Sure don't. Sure don't. Everybody in that place knows we was all drunker than shit, though.

Q: (DS) Did you get into any hassles while you were in there?

A: Nope. None that I can remember anyway. I don't know when I'm drinking whiskey what I do. I black out. And that's what the point was there in Memphis. I was at the stage I didn't know where I was at. I don't know how I got there. I don't know how I got upstairs or nothing. All I knew was STEVE always drug me around and took care of me. That's why I like being in his company cause he would always take care of me and get me to the room instead of getting arrested.

Q: (DS) You and STEVE are brother-in-laws, right?

A: Right. Well, no, not no more.

Q: (DS) But he was married to your sister?

A: Right. They got a divorce.

Q: (GS) When did you leave Memphis?

A: Two days later. Third day we left.

Q: (GS) And how did you leave?

A: Bus. To New Orleans. We rode the bus all the way to New Orleans.

Q: (DS) You said you lost four hundred dollars to hookers there.

A: Taxi cab driver set up a couple of hookers. And they ripped us off for four hundred, we had the rest of the money stashed in the vent.

Q: (DS) In a vent? What kind of vent?

A: Vent in the room. Air duct. STEVE's good about finding hiding places. And he decided let's hide the money. Just keep out of debt.

Q: (DS) Okay, you had two hookers in the room with you?

A: Yeah.

Q: (DS) How did they rip you off, GLENN?

A: Slipped us something. In our drinks or something. Made us pass out.

Q: (DS) Where did they get the money from?

A: Out of my wallet and out of his wallet.

Q: (DS) All right. Then you, did you tell us you took a bus and left there?

A: Yeah, sure did. And then we went to New Orleans.

Q: (DS) What kind of bus did you take?

A: Continental Trailways. We switched buses, bus companies. We rode all the way down there Continental Trailways to New Orleans. Got off at New Orleans, rented a motel.

Q: (DS) Remember the name of the motel?

A: No, I don't.

Q: (DS) How long did you stay at that motel?

A: One night.

Q: (DS) Then what did you do?

A: Um, I think we stayed in New Orleans two days too, in the motel, cause we could only get that one for one because they already had it rented out for the next day to someone else. It was already booked. New Orleans is a hard placed to get a motel you have to call for reservations or put up in front where you don't have one. We rented this other motel and stayed there a night and we got on Bourbon Street and seen all the sights there. There ain't nothing to see, just a ghetto. And then the next day we headed out on Greyhound.

Q: (GS) Where did you go?

A: From there to Homa, New Orleans.

Q: (DS) Homa, Louisiana, you mean?

A: Homa, Louisiana, yeah, excuse me.

Q: (GS) What did you do in Homa?

A: Look for a job. Stayed around the motel one day. Then we came back hitchhiking. We were getting low on cash. Hitchhiked back up and that's when we seen that carnival.

Q: (GS) What carnival did you see?

A: JACK THOMPSON's show. Uh, it was, uh, New Orleans.

Q: (DS) Where is the carnival itself located?

A: Uh, I don't know, to tell you the truth. I didn't know that much about Louisiana.

Q: (DS) You told us earlier. . . .

A: It's just south of New Orleans.

Q: (DS) You told us earlier that you got rid of the pistol to somebody that picked you up while you were hitchhiking, is this time?

A: Yeah, that was the time. From Homa back to the carnival is where I got rid of the pistol.

Q: (DS) And you do not remember the man's name.

A: No, I never even asked the man's name.

Q: (GS) Do you know what type of occupation he was in?

A: Oil field. Off shore. He was a welder. And he got hurt.

Q: (DS) Do you know how he worked for?

A: Sure don't. He drove a green beat up truck he was in.

Q: (DS) Pickup truck?

A: No, it was a flat bed. You open up the door and the door falls off. Only had one hinge holding the door on it, on both sides. Try to sell it to him for a hundred. All he had was fifty he said. So, I sold it to him for fifty. It was a hot gun anyway. It was already a gun that was in the robbery and committed a crime. Even I know that ballistics could show a thirty-eight shell through a .357 couldn't tell. I wouldn't take no chances, I sold it to him.

Q: (DS) Okay, then you saw the carnival.

A: And then I went to work for the carnival. Went up there and hired out to them. Stayed in a motel. The Fiesta Motel.

Q: (DS) Was this day time, night time?

A: It was day time.

Q: (DS) You went to work for them right then?

A: Well, went there, yeah, went to work for them and he told us it was their last night there, so, told us they wasn't doing no hiring, he said come back that night if we made good help sloughing. That's when they tear it down. So they call it sloughing.

Q: (DS) Sloughing means tearing down.

A: That's what it means, tearing down, getting ready to move. They said if we made good hands there they would put us to work. So we went out there and worked like to niggers, we were slaves, they put us on.

Q: (GS) How long did you work for this carnival?

A: Week, maybe two weeks.

Q: (GS) And where did you live during this time?

A: On the show, on the grounds itself. In sleeping bags, in trucks, underneath trucks.

Q: (GS) Where was that located from where the carnival was?

A: Right on the lot. Right on the lot, right where everything was at. That's where they sleep.

Q: (GS) Was this carnival stationary while you were working for them?

A: No, they would move around all the time. I think they moved the show three days, one spot five days, the last spot was a ten day spot and we got fired on it.

Q: (DS) Why did you get fired?

A: Cause I got everybody drunk all the time. They all picked up my habits. They told me to come back next year. If I ever wanted to come back they would give me a good ride if I could get off the whiskey.

Q: (DS) What did you do for the carnival?

A: I was running the double ferris wheel. A big ride man.

Q: (DS) What did STEVE do?

A: He run the sizzler. It was like the sizzler. Yeah it was the sizzler. That's what it was, a sizzler. Same thing as a, just little thing. They are just those little rides from up to, but they are for adults.

Q: (GS) Did you do anything else that cause you to be fired?

A: Yeah, shot off a shotgun shell. Did that on a night when we was all drunk. Right in the air. Just shot it in the air. We was all fucked up. We was all drinking Johnny Walker and Canadian we drank about, about two gallons between about eight people.

Q: You mentioned to us earlier that it was a long barrel gun but it ain't no more.

A: No, that's where we sawed it off at. Right there.

Q: (DS) At the carnival?

A: At the carnical

Q: (DS) When did you saw it off?

A: One night when we was all drinking?

Q: (DS) Who sawed the gun off?

A: I did.

Q: (DS) Was it sawed off before you shot it the night you are talking about then?

A: Yes. It made a pretty good noise. Eerybody came out with their artillery in hand ready to shoot them guns. He came over, we gave, we had a bunch of twenty gauge sheels that didn't fit nothing, we gave him that and told him that was all the shells. We told him just take the cap off and popped them with a hammer.

Q: (DS) This show was named Jack Thompson's Shows, did you say?

A: Right.

Q: Was he there?

A: Yes.

Q: (DS) Did he fire you right then?

A: No. He waited until he got some more work out of us then he fired us.

Q: (DS) When was this?

A: Oh, about two days later.

Q: (DS) After he fired you what did you do?

A: Went on down the road. Started hitchhiking and that's when we went into Texas. No we got a bus there because we had the money then, that he gave us.

Q: (DS) Did you leave that day or did you stay and

A: We left that day.

Q: (DS) You didn't stay in New Orleans any longer after you got fired?

A: Nope.

Q: (GS) How much money did you have with you at that time?

A: Hundred and twenty dollars, between us. We had to buy three tickets with it.

Q: (DS) Three tickets?

A: Yeah.

Q: (DS) Why the third ticket?

A: That's where we picked up Ginger at?

Q: (GS) Where did you meet Ginger?

A: I met her at a laundromat. We was sitting there, we went to buy a pack of cigarettes and I bough some cigarettes. She was standing at the laundromat door and I was sitting in this car and I thought she looked familiar. Then she came over to the car that was parked beside and talked to somebody else. And she said don't I know you and I said yeah, I know you too don't I. And she said from Schshoni, Wyoming and I said yeah. She said I'm Ginger. I said yeah, I said do you know who I am. She said yeah, you're Skip. I got out there, I stayed with her. Went to her house. She started being my girl then. (End of tape three)

Q: (GS) Ginger was your girl?

A: She was going to be my girl. She said she wanted to get away from her boyfriend down there. I said "Well, just come on with me." That's whenever I got fired from the carnival right then because they didn't want no girl being with me. Otherwise, I would probably be still working for them.

Q: (GS) Do you remember her full name?

A: No, I don't. To tell you the truth, I didn't even remember whenever she seen me at all until she said it.

Q: (DS) Okay, you said you bought you three tickets, three bus tickets.

A: That Paul's place, Lake Charles.

Q: (DS) Okay.

A: We got on the bus there. We got a cab. We got on the bus there.

Q: (DS) You got a cab from where?

A: From the motel.

Q: (DS) You were staying at a motel at that time?

A: Yeah.

Q: (DS) I thought you said a minute ago that you -- left as soon as you got fired.

A: Yeah, well, we got fired at night; about eleven o'clock at night so we went to that motel and stayed the night and that morning we left.

Q: (DS) I see. Okay, let me ask you a question, Glenn, from the time you left Enid up to this point, have you made any phone calls back to any of your folks or anywhere back here in Oklahoma?

A: Yes, I did.

Q: (DS) Who did you call?

A: I called my parents house. My sister answered the phone. I told her it was bugged so I only talked to her about a minute.

Q: (DS) When.

A: She said they're looking for you. I said, "That's all I want to know. Good-

bye, I'll talk to you later in another state, and hung up the phone.

Q: (DS) When did you make this phone call?

A: This was in -- keep wanting to think it's Ft. Smith, but I think it's in Memphis where I called from and I called right on the way before we left. Before we got our bus.

Q: (DS) Where did you call from?

A: From Memphis, I think. Memphis.

Q: (DS) I mean where at in Memphis? From the motel?

A: Motel itself, yeah.

Q: (DS) Okay. Did you make any more phone calls?

A: No. I made one when we left Louisiana from the motel that morning. She said the phone ain't bugged. She said they're looking pretty hard; FBI and everybody's looking for you.

Q: (DS) From when motel? You're talking about the morning you left New Orleans to go to Lake Charles?

A: Right. That motel.

Q: (DS) And who did you talk to?

A: My sister again. No, my mom. She says, "I don't know what you're going to do. I don't know what you're going to do." That's all she could say. I said,

"I love you, I'll talk to you later. I've got to go. Good-bye."

Q: (DS) Did you tell her where you were going?

A: No, I didn't tell her where I was. I never told nobody at the house where I was calling from or where I was going because I didn't know myself.

Q: (DS) Did you tell them you would be back or --

A: No.

Q: (DS) You didn't tell them anything when you talked to them?

A: Just told them I loved them and that was it.

Q: Okay. You get on the bus at New Orleans to go to Lake Charles. What bus did you ride?

A: Greyhound.

Q: (DS) Tell us about that.

A: We rode all the way to Nashville. Lake Charles where we met a guy about fifty miles before we got to Lake Charles that lived in Orange County, Texas. Lived in Orange, Texas, the town.

Q: (DS) Met him on the bus?

A: Met him on the bus, yeah. He was drinking whiskey with us on the bus and

he got a little crazy and the bus driver about kicked him off.

Q: (DS) What was his name?

A: I'm not good at names, but I can show -- I can see a face, but I don't know names unless I deal with them or something. I don't know who he was still.

Q: (GS) Where did you go with him?

A: To his house. And his wife and his daughter and us at the bus station.

Q: (DS) You said he lived in Orange.

A: Yes.

Q: (DS) How did you get any farther than Lake Charles, if you just bought a ticket to Lake Charles?

A: We bought another ticket from Lake Charles to Orange.

Q: (DS) Did you?

A: Uh-huh. About a fifty mile ride, forty mile ride, something like that.

Q: (GS) What was the reason for going to Orange?

A: Because he said he could put us up for the night. Because we said we were traveling and we had to get back on the road. We stayed there two days and then he gave us a ride out of town.

Q: (DS) What did you do when you were there?

A: Just drink; sit around and bullshit.

Q: (DS) Do you know what he did for a living?

A: He worked on a ship.

Q: (DS) Where at?

A: Out of New Orleans; somewhere out of New Orleans, some kind of ship, I don't know what it is. Freighter. He was a captain.

Q: (DS) Do you --

A: Of the ship.

Q: (DS) Do you know where his house was in Orange?

A: I could find it, but I don't know where it is.

Q: (DS) You don't know where to tell us where it is?

A: No, sure don't but there was quite a few rooms in it. I can barely remember how to get to it myself.

Q: (DS) Why did you decide to leave his place?

A: Because he wanted us to leave. He give us a ride out of town.

Q: (DS) Where did you go from there?

A: Up to that place in Texas. By that park.

Q: (DS) Do you remember where this was?

A: No, I sure don't.

Q: (DS) And you and Steve and Ginger all went with him from his house in his car --

A: Just a little Datsun pickup, yes.

Q: (DS) In his Datsun pickup?

A: Uh-huh.

Q: (DS) And what was the conversation then the reason you got out?

A: That we had to leave?

Q: (DS) No, that you got out of his truck. You said you got out of the car.

A: Well, that's as far as he was going to take us. He was going to a gas station to get some tires fixed or something. Lennie was his name.

Q: (DS) Lennie?

A: Lennie.

Q: (GS) Where did he let you out?

A: On the side of the road, close to a park, that's all I know.

Q: (GS) Where did you go?

A: Across the street to the park.

Q: (DS) How far west on I-10 did you go?

A: All the way in to New Mexico.

Q: (DS) Did you make any stops from the time you left there until you got to New Mexico?

A: Gas and stuff, that was it. We went straight through. Texas all the way to California. Non-stop.

Q: (GS) How did you pay for your gas?

A: Cash. Well, not all the way to Nevada.

Q: (DS) What time of the day did you leave Texas?

A: Evening time.

Q: (DS) Did you stop and spend the night any where?

A: No. Drove all night long. Tired us out. Came that morning, I wake up and I was driving.

Q: (DS) What kind of plates did the car have on it?

A: Had Texas plates on it. We switched them to Alabama plates. From Alabama plates to California plates.

Q: (DS) When did you change plates?

A: In Texas shortly -- that night. We left in the evening, about seven o'clock at his place and it was about eleven o'clock before we changed plates.

Q: (GS) Did you keep the Texas plate?

A: Yeah. No, we threw them away.

Q: (DS) Whereabouts?

A: At a rest stop. Where at, I don't know.

Q: (DS) About what date --

A: But it wasn't in Texas. I don't know what day it was. I wasn't keeping track of days.

Q: (GS) Do you know what day of the week it was?

A: I don't know what day of the week -- oh, Friday was payday.

Q: (DS) Was it a Friday?

A: It was Friday, I know that. I am pretty sure it was Friday. Might have been a Saturday or Sunday. I don't know for sure what approximate date it was on.

Q: (DS) Okay. After you went through Texas and got into New Mexico, where did you spend the night?

A: We didn't. We drove on.

Q: (GS) Where did you drive on to?

A: Heading towards Las Vegas. Stayed the night in Las Vegas.

Q: (GS) Do you know which motel?

A: No, we gambled all night. The next morning was day light and we went on North, towards Reno, but we've never been as far as Reno. We was heading on our way to Reno. We didn't make it towards Reno, we cut off over into California. Was getting low on cash again. Headed down south from there; I don't know what highway we was on -- we was on 357 or something like that. I don't know what highway that was and we stopped and I used that Gulf credit card one time. We got over to Barstow and there was no place to use Gulf so we started using that Visa there and we headed north into California, my hometown, and seen my old house and headed on north. Let's see -- we stayed in a motel, no, we didn't. We went on north and started cutting over west to Nevada. We got into Reno. We stayed the night there in Reno I think. I don't know where at and we gambled that night, the next day, lost our money, most of it. Had three or four hundred dollars left. I gave some money to Steve. I kept the rest. I knew he could handle money. We made it on into Battle Mountain and then I bought a bunch of whiskey and we partied for three days there, drinking whiskey and stuff and we left and headed into Utah. Stayed in Utah, Salt Lake, spent a couple of nights in Provo, couple, three nights. Three nights, I believe it was and then we went into Wyoming. Stayed the night in Rock Springs. The next day We went to Baggs

and that's where we got Russell at. Right out south of Baggs that night.

Q: (GS) If you would, describe your activities while you were in Baggs.

A: Went over to see some friends I had.

Q: (GS) Who were the friends?

A: The friends -- weren't even home. They were Rosyan and Johnny.

Q: (GS) What's their last name?

A: I don't know. I know they are not married. They lived together for eight years, but they're not married. And then I went over to see Linda Crowdad and that's where my old lady and Linda got together and I guess that's where they decided to turn me in. Then I was in a bar and found out what they were going to do and busted her glasses went for my gun; couldn't find no gun; cops found me I did a chow.

Q: (GS) What were you going to do with the gun?

A: I don't know what I was going to do it. I was just going to take it and head south; get out of here. Head back west.

Q: (DS) What kind of gun was this?

A: Seven millimeter rifle.

Q: (DS) Okay. In Baggs, you said you busted Ginger's glasses. Then what did you do?

A: Left.

Q: (DS) Left the bar.

A: Left the bar.

Q: (DS) Where did you go from there?

A: Went back to find the gun; couldn't find the gun. The cops seen me so I took off like a bat out of hell. I lost them.

Q: (GS) What were you driving at that time?

A: A 280-2

Q: (DS) What kind of plates did you have on it at that time?

A: California.

Q: (DS) Where did you get them?

A: Stole them off the car that was abandoned on the road, a Chevy Vega Station Wagen. Had the windows all broke in on it, but the plates were still good on it. I looked at the plates.

Q: (DS) What do you mean they were still good?

A: They still had the time left on it before it expired. It ran through December.

Q: (DS) Okay. You said the cops got after you. What happened there?

A: Pardon?

Q: (DS) You said the cops got after you in Baggs. What happened there?

A: I lost them. I went out of Baggs and went south and lost them. I high-speed chase.

Q: (DS) Can you tell us how you lost them?

A: We was going straight down the highway south towards Craig, Colorado, and I got up to a speed of 135 and left them behind me. I slowed down long enough for me to go into a power slide and turned back around to 180 and turned back around and went and passed him up. He was going the other way and I was going this way. He probably thought I was regular traffic. And I cut off on this other road --

Q: (DS) You were going back towards Baggs at that time?

A: Right. And then I cut off on this other side road where I knew where a oil field was. Went down that road a few miles, pulled off on this other road, killed our lights and everything, backed up, got turned around and whenever I seen him go by and seen the lights go out of sight, I went on back out to the highway and headed south again. That's where we found that guy's house and we turned off at his house just to get off on another road. Didn't know where we was at.

Q: (DS) Did you drive up to his house?

A: Drove as much as we could until the snow stopped us. Got stuck in the snow.

Q: (DS) Got stuck in the snow?

A: Uh-huh.

Q: (DS) How far from his house?

A: Hundred yards.

Q: (DS) Okay. You were arrested and taken to jail there in Craig, Colorado. Is that correct.

A: Correct.

Q: (DS) How long was that before we came up there?

A: From that morning to that evening. And we were extradited that night up there.

Q: (DS) Okay. Glenn, is there anything else you want to say to us?

A: Yes, there is. Out of all this here, I want the death sentence. And I want an injection as soon as possible. After -- I would like to have a little bit of time to see my parents and my nephew and then I'm ready to be executed, but this shouldn't be on Steve's part because Steve can't kill nobody because he don't have no guts to do nothing. All this doing was my brain; none of his. He just went along with the program because I think he was scared of me. That's all I have to say.

Q: (DS) Okay. Since you say that's all you have to say, let's end this conversation interview with Glenn Burton Ake. This interview began at 9:05 p.m., on Friday, the 23rd day of November, 1979, and will end at 11:35 p.m., on the same day. The same three people are present as at the beginning.

I have read this statement consisting of 44 pages, and I certify that the facts contained therein are true and correct. I further certify that I have made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

s/Glen Burton Ake
GLEN BURTON AKE

WITNESS: s/D.L. Stedman

WITNESS: s/Greg D. Shields

Subscribed and sworn to before me, Carol Nichols, a Notary Public, this 26th day of November, 1979.

s/Carol Nichols
Notary Public

My commission expires: 2-6-81.
(Seal)

OCT 30 1984

ALEXANDER L. STEVAS,
CLERK

No. 83-5424

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

GLEN BURTON AKE, *Petitioner,*

v.

STATE OF OKLAHOMA, *Respondent.*

On Writ Of Certiorari To The
Oklahoma Court Of Criminal Appeals

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TABLE OF CONTENTS

	Page
ARGUMENT:	
I. OKLAHOMA'S REFUSAL TO PROVIDE PETITIONER WITH A PSYCHIATRIC EXAMINATION DEPRIVED HIM OF A FAIR TRIAL	1
A. The Law Of Oklahoma Flatly Rejects Any Right To Expert Assistance For Indigent De- fendants	1
B. Petitioner's Sanity Was Seriously In Issue ..	4
C. Expert Assistance Is A Necessity When Sanity Is In Issue	10
II. OKLAHOMA'S REFUSAL TO PROVIDE PETITIONER WITH EXPERT ASSISTANCE DEPRIVED HIM OF A FAIR SEN- TENCING PROCEEDING	15
III. THE TRIAL COURT'S FAILURE TO INQUIRE INTO PETI- TIONER'S COMPETENCE DEPRIVED HIM OF A FAIR TRIAL	17
CONCLUSION	20
APPENDIX:	
American Bar Association Criminal Justice Mental Health Standards:	
Standard 7-3.3: Evaluations Initiated by Defense ...	1a
Standard 7-4.2: Responsibility for Raising the Issue of Incompetence to Stand Trial	2a
Standard 7-4.7: Necessity for Hearing on Competence to Stand Trial	4a
Standard 7-4.14: Trial of Defendants on Medication .	5a
Standard 7-9.4: Assistance of Experts During Sentenc- ing	5a

TABLE OF AUTHORITIES

CASES:	Page
<i>Ake v. State</i> , 633 P.2d 1 (Okla. Crim. App. 1983)	1, 3, 4, 10, 11, 16, 18
<i>Barefoot v. Estelle</i> , 103 S.Ct. 3383 (1983)	16, 17
<i>Beck v. State</i> , 626 P.2d 327 (Okla. Crim. App. 1981) ..	19
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	5
<i>Caldwell v. State</i> , 443 So.2d 806 (Miss. 1984), cert. granted sub nom. <i>Caldwell v. Mississippi</i> , No. 83-6607 (Oct. 9, 1984)	14
<i>Cox v. State</i> , 644 P.2d 1077 (Okla. Crim. App. 1982) ..	2
<i>Dennis v. State</i> , 561 P.2d 88 (Okla. Crim. App. 1977) ..	2
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	18, 19
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	16
<i>Greenfield v. Wainwright</i> , 741 F.2d 329 (11th Cir. 1984) ..	6
<i>Hance v. Zant</i> , 696 F.2d 940 (11th Cir.), cert. denied, 103 S.Ct. 3544 (1983)	19
<i>High v. State</i> , 401 P.2d 189 (Okla. Crim. App. 1965) ..	7
<i>Jenkins v. Georgia</i> , 418 U.S. 153 (1974)	10
<i>Little v. Streeter</i> , 452 U.S. 1 (1981)	10
<i>Maghe v. State</i> , 620 P.2d 433 (Okla. Crim. App. 1980) ..	2
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966)	18
<i>Ruley v. Ohio</i> , 360 U.S. 423 (1959)	10
<i>State v. Johnson</i> , No. CRF-81-4939 (Okla. Cty. Dist. Ct. 1982)	3
<i>United States v. Byers</i> , 740 F.2d 1104 (D.C. Cir.), cert. denied, 104 S.Ct. 717 (1984)	17
<i>United States v. Chavis</i> , 476 F.2d 1137, on rehearing, 486 F.2d 1290 (D.C. Cir. 1973)	15
<i>United States v. Taylor</i> , 437 F.2d 371 (4th Cir. 1971) ..	12
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980)	11
<i>Wilson v. State</i> , 568 P.2d 1279 (Okla. Crim. App. 1977) ..	7
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
U.S. Const. Amend. VI	12

Table of Authorities Continued

	Page
Del. Ct. of Common Pleas Crim. R. 44(e) (1981)	14
Ohio Rev. Code Ann. § 2945.39 (Page 1982 Repl. Vol.) ..	14
Okla. Stat. tit. 20 § 1304(b)(3) (1980)	2
Okla. Stat. tit. 74 § 285(15) note (Supp. 1983)	14
Utah Code Ann. § 77-14-4 (1982 Repl. Vol. & Supp. 1983)	14
MEDICAL REFERENCES:	
American Psychiatric Ass'n, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (3rd ed. 1980)	4, 5
Bemporad & Pinsker, <i>Schizophrenia: The Manifest Symptomatology</i> , in 3 <i>American Handbook of Psychiatry</i> (S. Arieti 2d ed. 1974)	6
A. Chapman, <i>Textbook of Clinical Psychiatry</i> (2d ed. 1974)	7
Day & Semrad, <i>Schizophrenic Reactions</i> , in <i>The Harvard Guide to Modern Psychiatry</i> (A. Nicholi ed. 1978) ..	8
T. DuQuesne & J. Reeves, <i>A Handbook of Psychoactive Medicine</i> (1982)	10
Hawkins, et al., <i>A Multivariant Psychopharmacologic Study in Normals</i> , 23 <i>Psychosomatic Medicine</i> 1 (1961)	10
Jones, <i>Mental Illness and Drugs</i> , in <i>Drugs and Psychopathology</i> (G. Austin et al. eds. 1977)	8
L. Kolb & K. Brodie, <i>Modern Clinical Psychiatry</i> (10th ed. 1982)	9
G. Stimmel, <i>Schizophrenia</i> , in <i>Clinical Pharmacy and Therapeutics</i> (Herfindel & Hirschman 2d ed. 1979)	9
I. Weiner, <i>Psychodiagnosis in Schizophrenia</i> (1966) ..	6
MISCELLANEOUS:	
American Bar Ass'n, <i>ABA Criminal Justice Mental Health Standards</i> (1984):	
Standard 7-3.3	12, 1a

Table of Authorities Continued

	Page
Standard 7-4.2	19, 2a
Standard 7-4.7	18, 4a
Standard 7-4.14	19, 5a
Standard 7-9.4	16, 5a
<i>El Reno Daily Tribune</i> , June 25, 1980	18
<i>El Reno Daily Tribune</i> , June 26, 1980	18
Nat'l Mental Health Ass'n, <i>Myths and Realities: A Report of the National Commission on the Insanity Defense</i> (1983)	11, 14
Renée [pseudonym], <i>Autobiography of a Schizophrenic Girl</i> (1951)	7
B. Sales, <i>et al.</i> , <i>Disabled Persons and the Law</i> (1982) .	14
M. Vonnegut, <i>The Eden Express</i> (1975)	7

REPLY BRIEF FOR THE PETITIONER

I. OKLAHOMA'S REFUSAL TO PROVIDE PETITIONER WITH A PSYCHIATRIC EXAMINATION DEPRIVED HIM OF A FAIR TRIAL

A. The Law of Oklahoma Flatly Rejects Any Right to Expert Assistance for Indigent Defendants

The Attorney General of Oklahoma, in his submission to this Court, has conceded the existence of the constitutional right for which petitioner contends:

The State concedes that there may be cases in which the denial of funds to conduct examinations or tests requiring expert witnesses would render the trial so fundamentally unfair as to deny due process. *Obviously*, a state may take some action or refuse to provide an indigent access to a defense which constitutes such a denial.

R. Br. 45 (emphasis added).¹ We agree with the Attorney General that this is "obvious." *But the courts of Oklahoma deny the existence of any such right.* As the Court of Criminal Appeals reiterated in this case:

We have held numerous times that the unique nature of capital crimes notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes.

Ake v. State, 633 P.2d 1,6 (Okla. Crim. App. 1983), J.A. 71. The Attorney General argues—incorrectly, as we show below—that petitioner was not entitled to a psychiatric examination or assistance because his sanity was not seriously in issue. But in Oklahoma, a defendant's need for expert assistance is quite irrelevant; such assistance is available in *no* case. The Court of Criminal Appeals has explained:

[S]tate legislators could appropriately provide impecunious defendants with this [expert] aid if

¹ "R. Br. ____" indicates references to respondent's brief in this Court.

deemed practical and in the public interest. In the absence of enabling legislation, we know of no judicial precedent, *constitutional mandate*, or statutory authority in Oklahoma obligating this state, at its expense, to make available to the appellant, in addition to counsel, the full paraphernalia of defense.

Maghe v. State, 620 P.2d 433, 435 (Okla. Crim. App. 1980) (emphasis added). Psychiatric and other assistance has repeatedly been denied on this ground, without regard to the facts of the particular case before the court. *See, e.g., Cox v. State*, 644 P.2d 1077 (Okla. Crim. App. 1982); *Dennis v. State*, 561 P.2d 88,98 (Okla. Crim. App. 1977).

Although the Oklahoma legislature has provided funds to pay the prosecution's experts, *see* Okla. Stat. tit. 20 § 1304(b)(3), it has provided no funds for defense experts. Respondent has not cited a single case, on any facts, in which the Court of Criminal Appeals has found expert assistance necessary for an indigent defendant. Oklahoma uniformly refuses to provide such assistance, even when the need is recognized. *See* Brief Amici Curiae of the Public Defender of Oklahoma County, *et al.*, at 4-9 and Appendices A and B thereto.

The remarks of the trial judge in a recent case sum up the state of the law in Oklahoma. The defendant had moved for a psychological evaluation. The judge replied:

[Y]ou can't hire investigators and you can't hire experts . . . I think you're right on the law. . . . I know you're right.

But the trouble of it is, there's three fellows out there on the State Capitol [i.e. the Court of Criminal Appeals] that say that that's not the law. And you took it out there and they overruled you—and they overruled me, not you. And I think they're flirting with dynamite.

. . .

I cannot legally give you those funds. And what the Supreme Court of the United States is going to say about it one of these days is another ball game. But I can't do that. And the Court of Criminal Appeals told me that you can't do this. I've got to follow them.

. . .

You've got to convince them out there. That's who you've got to convince.

[Defense Counsel]: I've tried.

The Court: Take it on up to the Supreme Court of the United States.

State v. Johnson, No. CRF-81-4939 (Okla. Cty. Dist. Ct., hearing of Jan. 28, 1982) (transcript excerpts printed in Appendix B to Brief Amici Curiae of the Public Defender of Oklahoma County, *et al.*).

The trial judge in the instant case confirmed that it was the unyielding law of Oklahoma, and not the facts before him, that compelled denial of petitioner's motion for a psychiatric examination. Acknowledging the relevancy and materiality of such an examination, the court agreed that Ake was entitled to one and ordered him to be made available for one "if you [defense counsel] are able to arrange it." J.A. 21. But, openly characterizing the law of Oklahoma as "almost crippling restrictive" in this respect, the court stated that it "could not even consider" granting the motion for a psychiatric examination at State expense. J.A. 20, 21. The Court of Criminal Appeals rejected Ake's appeal on this issue *as a matter of law*, without any discussion of the facts to determine whether a psychiatric examination had been necessary in this case. *Ake v. State*, 663 P.2d at 6, J.A. 71.

That is the judgment which is here for review. The Attorney General's acknowledgement that a state-funded defense expert may be constitutionally required

in some cases is nothing less than a confession that the contrary law of Oklahoma, which was applied in this case, is constitutionally infirm.

B. Petitioner's Sanity Was Seriously In Issue

The State argues that Ake was not entitled to a psychiatric examination directed to his mental condition at the time of the crime because his sanity was not seriously in issue. R. Br. 20, 44. The record shows the contrary.

In Oklahoma, a defendant's mental condition is in issue if the defendant raises a reasonable doubt about his sanity at the time of the crime. *Ake v. State*, 663 P.2d at 10, J.A. 78.

At trial, two psychiatrists and a physician testified that when they examined Ake—between four and six months after the crime—he was seriously ill, with a diagnosis of chronic paranoid schizophrenia. J.A. 33, 35 (Dr. Allan); 42 (Dr. Enos); 49, 52 (Dr. Garcia). The doctors testified that their diagnoses were based on the criteria contained in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. J.A. 43, 45 (Dr. Enos); Tr. 565 (Dr. Allan).² Under those criteria, a diagnosis of schizophrenia requires "[c]ontinuous signs of the illness for at least six months," and a diagnosis of chronic schizophrenia requires more or less continuous signs of illness during a period of "greater than two years." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 189, 192 (3rd ed. 1980).³

² "Tr. ____" indicates references to the trial transcript.

³ These prerequisites for the diagnosis of schizophrenia were not called to the attention of the jury, apparently because defense counsel were not familiar with them—a concrete example of how the pre-trial assistance of a mental health expert could materially have assisted in the presentation of the defense case. By contrast, the

Even without other evidence, these diagnostic criteria raised a reasonable doubt of Ake's sanity at the time of the crime. But there was substantial additional evidence. Dr. Allan testified that Ake's mental illness might well have begun in childhood, and he specifically noted the possibility that Ake's illness may have been "apparent" at the time of the crime. J.A. 38. And Dr. Garcia, the State's Chief Forensic Psychiatrist, testified that a person with Ake's diagnosis who had been using drugs and alcohol (as Ake had been on the day of the crime), might not have been able to tell right from wrong. J.A. 54.

Of course, direct testimony by a psychiatrist who had examined Ake with respect to his condition at the time of the crime would have been more conclusive. But the absence of such testimony was the unavoidable result of the State's refusal to provide Ake with the means to obtain *any* professional examination on that issue.

The State points to several facts that, it claims, prove Ake's sanity at the time of the crime. But these contentions disclose only that the State labors under several serious misconceptions about the nature of mental illness—misconceptions that the jury is likely to have shared.

Respondent asserts, first, that Ake "exhibited no signs of mental illness" at the time of the crime because he acted rationally and spoke coherently. R. Br. 20-21. Respondent seems to be of the view that a person must look or act "crazy" to be mentally ill. This is not the case. *See, e.g.,*

prosecutor was apparently quite familiar with the *Diagnostic and Statistical Manual*. *See, e.g.,* Tr. 565, 576, 581. However, he did not mention the six month durational requirement for the diagnosis of schizophrenia. Rather, he argued to the jury, as the State now argues in this Court, that there was no evidence that Ake was mentally ill at the time of the crime. J.A. 55. *Cf. Brady v. Maryland*, 373 U.S. 83 (1963).

Bemporad & Pinsker, *Schizophrenia: The Manifest Symptomatology* in 3 *American Handbook of Psychiatry* 525, 539 (S. Arieti 2d ed. 1974) (paranoid schizophrenics often show "no gross evidence of thought process disturbance"); I. Weiner, *Psychodiagnosis in Schizophrenia* 304 (1966) (in paranoid schizophrenia, "intellectual functioning is relatively preserved"). As the Court of Appeals for the Eleventh Circuit recently explained:

Insanity is a broad term covering a variety of mental and emotional diseases. The level of lucidity under which an insane person operates and the symptoms displayed may vary with time. A person's apparent level of comprehension may not always correspond to his level of sanity at the time. . . .

Paranoid schizophrenics are often quiet. They are also often capable of spawning complex, rational plans of action, even though they are operating under delusions.

Greenfield v. Wainwright, 741 F.2d 329, 333 (11th Cir. 1984).⁴

Second, respondent claims that Ake's detailed statement recalling the events of the day in question "refutes any claim that Ake was delusional at the time of the murders." R. Br. 22. Again, this displays a serious misunderstanding of the nature of schizophrenia. Schizophrenic persons may later remember clearly and in great detail their thoughts and actions while in a psychotic state. Some have even written books about their experiences

⁴ In any event, respondent's contention that "[n]othing in the conduct of the crime . . . gives the slightest indication" of insanity (R. Br. 20) is not altogether accurate. For example, as respondent recites in its brief, Ake "remarked to the family that *he liked to shoot people*. . . . He kept talking about shooting people and how there was *nothing wrong with it*." R. Br. 7 (citing Tr. 439-440) (emphasis added). Yet Ake had no prior record of violent behavior. See Report of the Trial Judge, at 5.

while mentally ill. See, e.g., Renée [pseudonym], *Autobiography of a Schizophrenic Girl* (1951); M. Vonnegut, *The Eden Express* (1975).

Third, respondent notes that lay testimony is admissible on the issue of a defendant's sanity, R. Br. 28, and suggests that the failure to call as witnesses Ake's relatives and others who saw him earlier on the day of the crime somehow proves that Ake was sane or that his sanity was not in issue. R. Br. 28-32. But the absence of such testimony cannot negate the reasonable doubt that is independently present in this record.⁵ Moreover, lay observers may not be able to appreciate the symptoms of schizophrenia. As noted above, a paranoid schizophrenic may act in an apparently rational manner much of the time:

The onset often is so subtle and slow that the illness imperceptibly unfolds over a period of many months or years. The patient's withdrawal from interpersonal relationships and the appearance of other schizophrenic symptoms are so gradual that people around the patient may not be aware of his illness until it is far advanced.

A. Chapman, *Textbook of Clinical Psychiatry* 265 (2d ed. 1974). Yet full-blown psychosis may begin abruptly and

⁵ The Oklahoma courts may admit lay testimony, but they treat it as inadequate to raise even a reasonable doubt about a defendant's sanity. Thus, in *High v. State*, 401 P.2d 189 (Okla. Crim. App. 1965), the testimony of a non-psychiatrist physician that the defendant could have "blacked out" during the crime was held inadequate to raise any doubt about defendant's sanity. *Id.* at 195. The court revealed its awareness of the necessity of psychiatric testimony on this issue when it noted that, by contrast, the testimony of a psychiatrist "could have raised the question of insanity." *Id.* Similarly, in *Wilson v. State*, 568 P.2d 1279 (Okla. Crim. App. 1977), the testimony of two deputy sheriffs that the defendant was "not a normal person" was held to have raised "no reasonable doubt of defendant's sanity." *Id.* at 1280-81.

"may be accompanied by belligerence, combativeness and destructiveness." *Id.*

Indeed, the events in Ake's life immediately preceding the killings involved in this case are strikingly consistent with the sudden onset of an acute psychotic episode. The morning of the crime, Ake discovered that his wife or girlfriend (the nature of their relationship is not clear from the record) had left him and was sleeping with someone else. R. Br. App. 3a. He spent much of that day in a futile search for her. R. Br. App. 3a, 11a, 23a. Beginning early that morning, he started drinking heavily and taking a variety of drugs, including both marijuana and cocaine. R. Br. App. 3a, 4a, 12a, 13a. These events may well have combined to trigger an acute exacerbation that could not have been observed by those who saw Ake early in the day because it may not yet have developed.

"Acute onset [of schizophrenia] is triggered by an event with critical intrapsychic meaning for the patient. In our experience, this catalyst is most often a loss, especially that of a person to whom the patient has been close and with whom he has a mutually dependent relationship. . . . When onset is acute, the patient is faced with three alternatives for dealing with his unbearable pain: homicide, suicide, or psychosis." Day & Semrad, *Schizophrenic Reactions*, in *The Harvard Guide to Modern Psychiatry* 199, 220 (A. Nicholi ed. 1978).

Excessive alcohol and drug use are similarly recognized as causes of acute exacerbation: "Cannabis [marijuana] may precipitate psychotic reactions in people with schizophrenia. . . . Individuals with psychopathology appear to be at greater risk for the development of psychosis consequent to amphetamine or cocaine use." Jones, *Mental Illness and Drugs in Drugs and Psychopathology* 126 (G. Austin *et al.* eds. 1977). "There seems to be reason to believe that if a certain type of personality takes large

quantities of alcohol over a considerable period of time, a psychogenic reaction of an acute schizophrenic nature may be liberated." L. Kolb & K. Brodie, *Modern Clinical Psychiatry* 634 (10th ed. 1982).⁶

Naturally, these library references cannot prove that Ake was suffering an acute schizophrenic episode at the time of the crime. But they do demonstrate the necessity of a professional examination to determine Ake's condition at that time—the examination Ake requested and was denied. They also demonstrate that the State's suppositions about mental illness—that it is incompatible with outwardly rational conduct, that it is incompatible with a clear recollection of events, and that its existence is necessarily apparent to lay observers—are strikingly fallacious. Nothing could demonstrate more forcefully the necessity of expert assistance, for the jurors (and perhaps even defense counsel) may have held the same "common sense" but false beliefs about mental illness, beliefs that could have been corrected both in general and, perhaps, with respect to Ake in particular, if expert psychiatric or psychological assistance had been available to the defense.

Finally, respondent suggests that Ake's symptoms of mental illness were probably "staged" in a calculated attempt to establish a counterfeit insanity defense. R. Br. 27-28. Not only was this suggestion positively and emphatically rejected by the State's own Chief Forensic Psychiatrist, *see* J.A. 48, 51, but it is physiologically

⁶ Respondent also suggests that Ake's apparently rational behavior during the weeks after the killings negates any possibility of insanity. R. Br. 23-24. But schizophrenia may be "characterized by periods of crisis accompanied by acute psychotic symptoms, interspersed with periods of partial or complete remission." G. Stimmel, *Schizophrenia*, in *Clinical Pharmacy and Therapeutics* 555, 558 (Herfindel & Hirschman 2d ed. 1979).

incompatible with the fact that Ake was being administered 600 mgs. Thorazine per day prior to and during his trial. If Ake had not been truly suffering from serious mental illness at that time, it is doubtful that he could have remained awake under such medication. See T. Duquesne & J. Reeves, *A Handbook of Psychoactive Medicine* 356 (1982) (Thorazine gives "normal" subjects an "irresistible urge to sleep"); Hawkins, *et al.*, *A Multivariate Psychopharmacologic Study in Normals*, 23 *Psychosomatic Medicine* 1 (1961) (25 mg. doses of Thorazine caused sedation, dysphoria and mental clouding in normal volunteers).

In sum, respondent has failed to present any credible rebuttal to the showing that Ake's mental condition at the time of the crime was seriously in issue, and that he required psychiatric assistance to develop and present his insanity defense.⁷

C. Expert Assistance Is A Necessity When Sanity Is In Issue

Having conceded the existence of a constitutional right to necessary expert assistance, respondent nevertheless resists its implementation.

1. Respondent attempts to distinguish *Little v. Streater*, 452 U.S. 1 (1981) on two grounds: (a) the "unfair evidentiary burden" placed upon the putative father in

⁷ The State argues, as it did in its opposition to certiorari, that Ake waived his right to seek review on this issue by failing to raise it in his motion for a new trial, which was filed in the trial court one day after the jury's verdict. R. Br. 47-49. This contention is without merit. The Oklahoma Court of Criminal Appeals considered and rejected this federal claim on its merits. *Ake v. State*, 633 P.2d at 6, J.A. 71. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959); see also *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

Little because his testimony, alone, was insufficient to overcome the mother's prima facie case, and (b) the high degree of scientific reliability of blood tests. R. Br. 37-38. These distinctions do not distinguish. In Oklahoma, the burden is on the defendant to raise by evidence a reasonable doubt about his sanity at the time of the crime.⁸ As shown above (n. 5), this appears to be a practical impossibility without psychiatric testimony. And while blood testing is a more exact science than psychiatry, psychiatric diagnosis is in fact highly reliable, with diagnostic concurrence among psychiatrists exceeding 80%. See Nat'l Mental Health Ass'n, *Myths and Realities: A Report of the National Commission on the Insanity Defense* 24 (1983). Like blood testing, expert psychiatric diagnosis is essential because there is no adequate evidentiary substitute: "Absent such an examination, it is virtually inconceivable that the insanity claim will be given a fair hearing." Brief Amicus Curiae of the American Psychiatric Ass'n, at 7. As Justice Powell has observed, a defendant whose case turns on a mental health issue might be better off with a psychiatrist than with a lawyer, if he could have only one person to assist his defense. *Vitek v. Jones*, 445 U.S. 480, 500 (1980) (Powell, J., concurring).

The necessity of expert assistance in cases where sanity is in issue was recognized by the American Bar Associ-

⁸ Respondent's assertion that "[t]he instructions given to the jury placed upon the state the burden of proving beyond a reasonable doubt that Ake was sane at the time of the commission of the crime," R. Br. 38, is simply untrue. The jury was charged:

the burden of proof is on the defendant to raise in the minds of the jury a reasonable doubt of the defendant's sanity at the time of the commission of the acts in question.

J.A. 58 (emphasis added). The Court of Criminal Appeals held that Ake had "failed to establish any reasonable doubt as to his sanity," and that the burden of proof on that issue had therefore never shifted to the prosecution. *Ake v. State*, 663 P.2d at 10, J.A. 78.

ation this year, when it formally adopted a comprehensive set of Criminal Justice Mental Health Standards. Standard 7-3.3 provides that in such cases

each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified . . . professional selected by the defendant in any case involving a defendant financially unable to afford such an evaluation.

ABA Criminal Justice Mental Health Standards 86 (1984). This right is recognized to be grounded in the Sixth Amendment right to effective assistance of counsel. *Id.* at 87 (Commentary to Standard 7-3.3). As the Commentary notes, an expert "not only provides testimony that is *necessary* at trial to support the defense of mental nonresponsibility, but also 'attunes the lay attorney to unfamiliar but central medical concepts and enables him . . . to probe intelligently the foundations of adverse testimony.'" *Id.* at 88 (emphasis added), quoting *United States v. Taylor*, 437 F.2d 371, 377 n.9 (4th Cir. 1971) (Haynesworth, C.J.).⁹

2. Predictably, Oklahoma raises the specter of a "staggering" new fiscal burden upon the States if a constitutional right to necessary expert assistance is recognized. R. Br. 47. This fear is demonstrably illusory. As noted in our main brief, the federal courts and most states already provide such assistance. The evidence shows that

⁹ A copy of the complete *ABA Criminal Justice Mental Health Standards* with accompanying Commentary has been lodged with the Clerk and served upon respondent's counsel. Copies were also transmitted to the Chambers of all Justices on September 7, 1984, by Chief Justice William H. Erickson of the Colorado Supreme Court in his capacity as Chairman of the ABA Standing Committee on Association Standards for Criminal Justice. The full texts of the relevant black-letter standards are set out in an Appendix to this brief.

the cost is not burdensome.¹⁰ Under the federal Criminal Justice Act, only \$196,823 was expended nationwide for psychiatric and psychological experts, and only \$832,305 for *all* expert services, in fiscal year 1983. In States bordering Oklahoma, expenditures have been similarly modest:

Kansas	\$53,995	(all experts and investigators)
Missouri	\$26,179	(all experts and investigators)
New Mexico	\$129,000	(all experts)
Colorado	\$230,943	(all defense and prosecution experts)

Expenses for expert assistance for indigent defendants in other States are of the same order:

Hawaii	\$42,000	(all experts)
Massachusetts	\$300,000	(all experts and all indigents' expenses in all civil cases)
New Jersey	\$428,252	(all experts)
New York	\$1,209,183	(all experts and investigators) ¹¹
Rhode Island	\$3,247	(psychiatrists and psychologists)
Vermont	\$18,292	(all experts)
Wisconsin	\$142,700	(all experts)
Wyoming	\$63,000	(all experts)

It is thus simply not the case that providing necessary expert services to indigent defendants will place an undue

¹⁰ The following data were obtained from the Administrative Office of United States Courts and from state public defender offices. Copies of the relevant documents have been lodged with the Clerk and served upon respondent's counsel. The data shown are for each jurisdiction's most recent available fiscal year.

¹¹ A study of expenses in 1978 in New York (Manhattan) and Bronx Counties indicated that investigators accounted for about 70% of total expenses, and psychiatrists and psychologists for about 20%.

strain on the Oklahoma State treasury.¹² In fact, there may well be a net savings, since it can be anticipated that an expert evaluation will often result in the dismissal of criminal charges or in a successful plea bargain in a case that would otherwise have gone to trial. Nationally, "the vast majority of insanity defense cases . . . are resolved through plea bargaining" after a psychiatric examination establishes the defendant's mental condition at the time of the crime. Nat'l Mental Health Ass'n, *Myths and Realities: A Report of the National Commission on the Insanity Defense* 23 (1983).

3. Respondent's assertion that reversal here would "open a pandora's box" of prisoner litigation, R. Br. 46, is similarly unfounded. No such litigation could ensue in the many jurisdictions where necessary expert assistance has already been available.¹³ In those few States where it has not been available, an applicant for post-conviction relief would still bear the burden of showing that he had made an adequate pre-trial demonstration of his need for expert assistance.¹⁴ To reiterate, we do not assert a right

¹² For fiscal year 1984, Oklahoma appropriated more than \$13 million for District Attorneys' offices, including \$312,000 for "Victim-Witness Coordinators." See Okla. Stat. tit. 74 § 285(15) note (Supp. 1983).

¹³ Thirty-two jurisdictions were listed in the main brief. Further research indicates that at least three other States provide for psychiatric assistance to indigent defendants in insanity defense cases. See Del. Ct. of Common Pleas Crim. R. 44(e) (1981); Ohio Rev. Code Ann. § 2945.39 (Page 1982 Repl. Vol.); Utah Code Ann. § 77-14-4 (1982 Repl. Vol. & Supp. 1983). Virtually all States provide for at least some psychiatric examination of a defendant whose plea is insanity. See B. Sales, et. al., *Disabled Persons and the Law* 705-08 (1982) (collecting statutes).

¹⁴ Compare *Caldwell v. State*, 443 So.2d 806, 812 (Miss. 1984) (defendant's request for psychiatric examination granted; denial of request for ballistics and footprint experts affirmed on ground that no showing of need had been made), cert. granted sub nom. *Caldwell v. Mississippi*, No. 83-6607 (Oct. 9, 1984).

to expert assistance "on demand." See Pet. Br. at 37 n.22; see also, e.g., *United States v. Chavis*, 476 F.2d 1137, on rehearing, 486 F.2d 1290 (D.C. Cir. 1973) (Wilkey, J.) (discussing criteria for right to psychiatric examination).¹⁵

* * *

What Oklahoma has done here is to place upon the defendant the burden of establishing a reasonable doubt as to sanity, set the threshold for such doubt so high that it can be crossed only by presenting direct psychiatric testimony on the question, and then refuse to provide indigent defendants with the means of obtaining such testimony. Such a practice cannot be squared with the minimum demands of due process.

II. OKLAHOMA'S REFUSAL TO PROVIDE PETITIONER WITH EXPERT ASSISTANCE DEPRIVED HIM OF A FAIR SENTENCING PROCEEDING

A. Oklahoma does not dispute the importance, at a capital sentencing proceeding, of testimony about a defendant's mental condition at the time of the crime. Indeed, the State volunteers that "virtually every murderer suffers from some degree of mental disability or personality disorder." R. Br. 52. But, it maintains, Ake's poverty-based inability to present expert testimony about his mental condition at the time of the crime to the jury in mitigation of punishment provides no grounds for reversal.

Respondent suggests three reasons for this conclusion: that Ake could have called lay witnesses, that he could

¹⁵ *Amicus* American Psychological Association suggests that this Court need only decide here that a defendant raising an insanity defense in a capital case has a right to some expert examination. Should the Court follow amicus' suggestion, the impact of its ruling would be even more attenuated.

have testified himself, and that the State has no obligation "to create exculpatory evidence." R. Br. 50-52.

As noted above, however, lay witnesses cannot necessarily be expected to perceive or understand, much less explain to a jury, the etiology, symptomatology, and nature of mental illness. And there were no lay witnesses (except the two surviving victims and Ake's co-defendant) to Ake's behavior at the time of the crime. Nor was Ake capable of testifying in his own behalf; he was unable even to communicate with his attorneys. *See* Pet. Br. 9-10; *Ake v. State*, 663 P.2d at 6, 7 n.5, J.A. 71, 73. When these circumstances are considered together with the strong evidence that Ake was in an acute schizophrenic episode at the time of the crime, the State's position amounts to an assertion that, with respect to indigent defendants, the State has no interest in assuring that the jury hears relevant and material mitigating evidence before it decides between life and death. But this Court has stressed that a consideration of the personal characteristics of the offender is not just a permissible but a "constitutionally indispensable part of the process of inflicting the penalty of death." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *accord*, *Barefoot v. Estelle*, 103 S. Ct. 3383, 3396 (1983).¹⁶

B. Respondent does not deny that the prosecution relied on psychiatric testimony to condemn Ake to death based on an "expert" prediction of future dangerousness. *See* Pet. Br. at 12; Tr. 714, 717.¹⁷ Indeed, the State makes

¹⁶ The ABA Criminal Justice Mental Health Standards also recognize the necessity for expert assistance at sentencing. *See* Standard 7-9.4 (set out at App. 5a, *infra*).

¹⁷ It is curious, to say the least, that the State's psychiatrists were unable to form any opinion about Ake's past mental condition because their examinations were limited in purpose to a determination of his present competence, but were able to form clear opinions about his future dangerousness on the basis of those same examinations.

no reply at all to the argument (Pet. Br. at 41-42) that due process minimally requires that when the prosecution relies on psychiatric testimony to establish the aggravating circumstance of future dangerousness, an indigent offender must be provided with the means to attempt to rebut that testimony in kind. For, as Judge Scalia recently noted in holding that the prosecution could constitutionally compel a defendant to submit to examination by a government psychiatrist, "[o]rordinarily the *only* effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony." *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir.) (en banc), *cert. denied*, 104 S. Ct. 717 (1984) (emphasis added). *Cf. Barefoot v. Estelle*, 103 S. Ct. at 3397 and n.5.

III. THE TRIAL COURT'S FAILURE TO INQUIRE INTO PETITIONER'S COMPETENCE DEPRIVED HIM OF A FAIR TRIAL

It is undisputed that the trial court made *no* inquiry into Ake's competence at the time of trial. Earlier, Ake had been found incompetent to stand trial after a judicial hearing. J.A. 11-15. Six weeks later, without further hearing or inquiry, he was presumed to be competent and ordered to stand trial while being medicated with Thorazine, simply on the strength of a letter (J.A. 16) from the State hospital. J.A. 3.

The State asserts that there "is nothing in the record or in Ake's Brief to suggest" that Ake was incompetent at the time of trial. R. Br. 56. This is willful blindness. *See* Pet. Br. 9-10. Defense counsel repeatedly called the trial court's attention to their client's inability to communicate with them, *see, e.g.*, J.A. 27, 54-55, and to his "zombie"-like state, *see* J.A. 26, Tr. 659, 661. The trial judge himself acknowledged that there was "all along a real question as to whether the man had any kind of mental capacity." Tr. 495. And the Oklahoma Court of Criminal

Appeals recognized that Ake "remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings." *Ake v. State*, 663 P.2d at 6, J.A. 71.¹⁸ These circumstances "created a sufficient doubt of [Ake's] competence to stand trial to require further inquiry." *Drope v. Missouri*, 420 U.S. 162, 180 (1975) (emphasis added). Accord *ABA Criminal Justice Mental Health Standards*, Standard 7-4.7, Necessity for Hearing on Competence to Stand Trial (set out at App. 4a, *infra*).

The State rests its defense of the trial court's failure to make *any* such inquiry on the hospital's letter and on Ake's counsel's pre-trial withdrawal of a motion for a jury trial on the issue of competence. R. Br. 54-56.

The hospital's letter (J.A. 16) was just boilerplate and was more than a month old by the time of trial. If Ake could improve from incompetent to competent in six weeks, it cannot be presumed conclusively that he could not again regress into incompetence in four weeks.

Nor can defense counsel's withdrawal of the motion for a jury trial on competency free the State from its responsibility. Both *Drope v. Missouri*, *supra*, and *Pate v. Robinson*, 383 U.S. 375 (1966), recognized that it is the court's obligation to inquire into a defendant's competence to stand trial if his competence appears questionable. See *Drope*, 420 U.S. at 172, 176-181; *Pate*, 383 U.S. at 384. "When a court has a 'bona fide doubt' as to the

¹⁸ The local media, which had no particular sympathy for Ake, confirmed these characterizations, reporting after the second day of trial: "Ake has shown no emotion as he sits at the defense table looking straight ahead." *El Reno Daily Tribune*, June 25, 1980, at 12, col. 1. After the case was submitted to the jury, the same newspaper reported: "The somber Ake, who sat unmoving during the 2½ day trial, continued his blank stare as the testimony portion of the trial ended." *Id.*, June 26, 1980, at 1, col. 5. As noted above (pp. 9-10), Ake's demeanor could not have been feigned.

defendant's competence, it must *sua sponte* conduct a hearing on his competence to stand trial." *Hance v. Zant*, 696 F.2d 940, 948 (11th Cir.), *cert. denied*, 103 S. Ct. 3544 (1983). The courts of Oklahoma are not unaware of this responsibility. See *Beck v. State*, 626 P.2d 327, 329 (Okla. Crim. App. 1981). Accord *ABA Criminal Justice Mental Health Standards*, Standard 7-4.2 (set out at App. 2a, *infra*).

Defense counsel stated their reason for withdrawing the pre-trial motion for a jury trial on competency: "[Ake] has just returned from Vinita [hospital]. The State's doctors have certified him competent to stand trial." J.A. 22-23. But once trial began, counsel became aware of Ake's actual condition and brought it promptly to the court's attention. See J.A. 26, 27. This Court has cautioned that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. at 181.

As mentioned earlier, the trial judge noted the existence of such circumstances on the record. Tr. 495. The court's failure to follow up with an inquiry into Ake's competence was constitutionally deficient.¹⁹

¹⁹ If this Court reverses Ake's conviction and remands for a new trial on the ground that he was unconstitutionally denied psychiatric assistance, it should nevertheless consider the competency issue. Ake's competency to stand trial under medication will again be an issue in any future trial, because Ake has been maintained on psychoactive medication since his conviction, and has repeatedly been transferred back and forth between the state prison and the mental hospital. The standards applicable to a determination of competency to stand trial under psychoactive medication should be clarified. See *ABA Criminal Justice Mental Health Standards*, Standard 7-4.14, Trial of Defendants on Medication (set out at App. 5a, *infra*).

CONCLUSION

For the reasons presented above and in petitioner's main brief, the judgment of the Oklahoma Court of Criminal Appeals should be reversed, and the case remanded for a new trial.

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APPENDIX

APPENDIX

American Bar Association
Criminal Justice Mental Health Standards
(adopted August 7, 1984)

STANDARD 7-3.3. EVALUATIONS INITIATED BY DEFENSE

(a) *Defense access to mental health or mental assistance and evaluation.* The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation. In such cases an attorney who believes that an evaluation could support a substantial legal defense should move for the appointment of a professional or professionals in an *ex parte* hearing. The court should grant the defense motion as a matter of course unless the court determines that the motion has no foundation. The court should promptly provide the prosecution with a copy of the order authorizing the evaluation. Assistance of mental health or mental retardation professionals during the sentencing process is governed by Standard 7-9.4.

(b) *Uses of disclosures.* Whenever a mental health or mental retardation professional conducts an evaluation of defendant's mental condition upon the request or motion of the defense, all disclosures made by defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege. As to that evalua-

tion only, the privilege is waived to the extent that discovery is permitted by Standard 7-3.8(b), if:

(i) Defendant gives notice pursuant to Standard 7-6.3 of an intention:

(A) to raise an issue concerning defendant's mental condition at the time of the alleged crime, and

(B) to introduce the testimony of the mental health or mental retardation professional who conducted the evaluation to support the defense claim on this issue; or,

(ii) Defendant calls another mental health or mental retardation professional as an expert witness concerning defendant's mental condition at the time of the alleged crime, and the prosecution establishes, to the court's satisfaction, that in bad faith the defendant secured evaluations by all available qualified mental health or mental retardation professionals in the area thereby depriving the prosecution of the opportunity to obtain an adequate evaluation.

This standard does not preclude a mental health or mental retardation professional from disclosing the fact that the professional evaluated a named person upon defense request.

STANDARD 7-4.2. RESPONSIBILITY FOR RAISING THE ISSUE OF INCOMPETENCE TO STAND TRIAL

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to stand trial at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.

(b) The prosecutor should move for evaluation of defendant's competence to stand trial whenever the prose-

cutor has a good faith doubt as to the defendant's competence. The prosecutor should further advise defense counsel and the court of any information which has come to the prosecution's attention relative to defendant's incompetence to stand trial.

(c) Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

(d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt that the defendant is competent to stand trial and that it is not filed for purposes of delay. The motion should also set forth the specific facts which have formed the basis for the motion.

(e) In the absence of good faith doubt that the defendant is competent to stand trial it is improper for either party to move for evaluation. It is improper for either party to use the incompetence process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiation or to delay the proceedings against the defendant.

(f) In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.

STANDARD 7-4.7. NECESSITY FOR HEARING ON COMPETENCE TO STAND TRIAL

(a) In every case in which a good faith doubt of the defendant's competence to stand trial has been raised and as soon as practicable after receipt of the reports of the evaluators, the court should conduct a hearing on the issue of competence to stand trial unless all parties stipulate that no hearing is necessary and the court concurs. If the defendant has been confined for examination, the hearing should be held within [seven] days of the receipt of the report of the evaluators; if the defendant is at liberty it should be held within [thirty] days.

(b) If the parties agree on the issue of competence to stand trial or issues related to treatment or habilitation, a stipulation containing the factual basis for the agreement may be accepted by the court and the court, after review of the factual basis for the stipulation, should enter the appropriate order on the basis of the stipulation. In the absence of stipulation by the parties and concurrence by the court, a hearing on the issues should be mandatory in all cases.

(c) Trial by jury should not be required for the hearing on the issues of competence to stand trial and issues related to treatment or habilitation, provided that in those jurisdictions which authorize trial by jury for determination of issues of involuntary civil commitment, jury trial should be available to a defendant to determine issues of competence to stand trial and of involuntary confinement for treatment or habilitation to effect competence.

STANDARD 7-4.14. TRIAL OF DEFENDANTS ON MEDICATION

(a) A defendant should not be considered incompetent to stand trial because the defendant's present mental competence is dependent upon continuation of treatment or habilitation which includes medication, nor should a defendant be prohibited from standing trial or entering a plea solely because that defendant is being provided such services under professional supervision.

(b) If the defendant proceeds to trial with the aid of treatment or habilitation which may affect demeanor, either party should have the right to introduce evidence regarding the treatment or habilitation and its effects and the jury should be instructed accordingly.

STANDARD 7-9.4. ASSISTANCE OF EXPERTS DURING SENTENCING

In discharging the duties specified in Standard 18-6.3(f), defense counsel may require the assistance of mental health or mental retardation professionals to explore the availability of evidence concerning the defendant's mental condition insofar as it may be relevant to issues of mitigation or disposition. Accordingly, in appropriate cases each jurisdiction should assure that this form of assistance is available to defendants who are financially unable to obtain such assistance.

MOTION FILED

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No. 83-5424

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

GLEN BURTON AKE,

PETITIONER,

v.

STATE OF OKLAHOMA

RESPONDENT.

**ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AND
SUPPLEMENTAL BRIEF
FOR THE PETITIONER**

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14 pp

TABLE OF CONTENTS

Page:

Motion for Leave to File Supplemental Brief	iv
--	----

Supplemental Brief:

Under Oklahoma Law, a Claim of Fundamental Error is Not Waived by Failure to Include it in a Motion for a New Trial	1
--	---

Conclusion	7
------------------	---

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
<u>Brown v. State</u> , 404 P.2d 78 (Okla. Crim. App. 1965).....	4
<u>Cobbs v. State</u> , 629 P.2d 368 (Okla. Crim. App. 1981)	4
<u>Cole v. State</u> , 647 P.2d 446 (Okla. Crim. App. 1982)	4
<u>Douglas v. Alabama</u> , 380 U.S. 415 (1965)	7
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	7
<u>Garcia v. State</u> 639 P.2d 88 (Okla. Crim App. 1981)	4
<u>Green v. State</u> , No. F-78-163 (Okla. Crim. App. Nov. 7, 1979)	2
<u>Hawkins v. State</u> , 569 P.2d 490 (Okla. Crim. App. 1977)	4
<u>Hux v. Murphy</u> , 733 F.2d 737 (10th Cir. 1984)	2
<u>Hurley v. State</u> , 416 P.2d 967 (Okla. Crim. App. 1966)	4
<u>Johnson v. State</u> , 155 P.2d 259 (Okla. Crim. App. 1945)	7
<u>Lewis v. State</u> , 569 P.2d 486 (Okla. Crim. App. 1977)	4
<u>McFarthing v. State</u> , 630 P.2d 324 (Okla. Crim. App. 1981)	6

<u>Rea v. State</u> , 105 P. 386 (Okla. Crim. App. 1909)	2
<u>Robinson v. State</u> , 444 P.2d 845 (Okla. Crim. App. 1968)	6
<u>Stowe v. State</u> , 397 P.2d 693 (Okla. Crim. App. 1964)	1, 2
<u>Tart v. State</u> , 634 P.2d 750 (Okla. Crim. App. 1981)	4
<u>Tobler v. State</u> , ___ P.2d ___, 55 Okla. Bar. J. 1789 (Okla. Crim. App. Sept. 10, 1984)	3
<u>Tucker v. State</u> , 675 P.2d 459 (Okla. Crim. App. 1984)	4
<u>United States v. Atkinson</u> , 297 U.S. 157 (1936)	5
<u>Williams v. Oklahoma City</u> , 395 U.S. 458 (1969)	7
<u>Williams v. State</u> , 658 P.2d 499 (Okla. Crim. App. 1983)	2

Statute:

Okla. stat. tit. 22 § 1051 (1981)	7
-----------------------------------	---

Miscellaneous:

<u>Note, Criminal Procedure:</u> <u>Oklahoma's Motion for New</u> <u>Trial in Criminal Cases</u> , 36 Okla. L. Rev. 888 (1983) ...	3, 7
---	------

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v.

STATE OF OKLAHOMA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF

Petitioner respectfully moves for leave to file the appended supplemental brief, addressing a question raised for the first time at the oral argument of this case.

At oral argument, several Justices raised the question whether there was an adequate and independent state ground on which one of the petitioner's constitutional claims had been rejected -- namely, that the claim had been waived

by failing to include it in petitioner's motion for a new trial. Respondent had never raised that jurisdictional issue, and petitioner's counsel was, regretfully, not prepared to address it at argument.

The appended supplemental brief shows that, under Oklahoma law, a claim of constitutional error is not waived by its failure to have been included in a motion for a new trial. This information may assist the Court in its consideration of this question.

For this reason, leave to file the appended supplemental brief should be granted.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 83-5424

GLEN BURTON AKE, PETITIONER,

v.

STATE OF OKLAHOMA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

SUPPLEMENTAL BRIEF FOR THE PETITIONER

UNDER OKLAHOMA LAW, A CLAIM
OF FUNDAMENTAL ERROR IS NOT
WAIVED BY FAILURE TO INCLUDE
IT IN A MOTION FOR A NEW TRIAL

Although Oklahoma generally requires that claims of error in criminal cases be raised in a motion for a new trial if they are to be considered on appeal, it has always recognized an exception to this rule for "fundamental" errors. See, e.g., Stowe v. State, 397 P.2d 693 (Okla. Crim. App. 1964):

[T]he Court has consistently held that where fundamental

error appears and justice requires, the Court of Criminal Appeals will consider such error, regardless of whether exceptions were taken in the court below, or whether such error is assigned on appeal.

Id. at 695, citing Rea v. State, 105 P. 386 (Okla. Crim. App. 1909). In Stowe, the conviction was reversed because of prejudicial comments by the trial judge, although the issue was not preserved in the motion for a new trial or in the petition in error. See also Williams v. State, 658 P.2d 499 (Okla. Crim. App. 1983) (conviction reversed because of prosecutor's improper comments although issue not raised in motion for new trial); Hux v. Murphy, 733 F.2d 737, 739 (10th Cir. 1984) (noting that Oklahoma Court of Criminal Appeals had reviewed petitioner's claim of improper jury instruction "under its 'fundamental error' rule"); Green v. State, No. F-78-163 (Okla. Crim. App. Nov. 7, 1979)

(unpublished; cited and quoted in Note, Criminal Procedure: Oklahoma's Motion for New Trial in Criminal Cases, 36 Okla. L. Rev. 888, 904 (1983)) (conviction reversed where defendant's motion to suppress evidence was improperly denied, although issue not preserved in motion for new trial or on appeal).

The same rule is applied when defense counsel fails to object at trial. See Tobler v. State, ___ P.2d ___, 55 Okla. Bar. J. 1789 (Okla. Crim. App. Sept. 10, 1984):

We note at the outset that virtually none of the instances of prejudice were objected at trial. Thus, we can only review these allegations of error if they are fundamental. . . . We will review [them] because there is no right which is more essential to an accused's defense than the right to a fair trial free from prejudice.

Id. at 1790-91 (conviction reversed where prejudicial evidence and comments admitted without objection). Accord,

Tart v. State, 634 P.2d 750 (Okla. Crim. App. 1981) (conviction reversed based on improper closing argument despite lack of objection at trial); Cobbs v. State, 629 P.2d 368 (Okla. Crim. App. 1981) (same); Lewis v. State, 569 P.2d 486 (Okla. Crim. App. 1977) (same).^{1/}

Oklahoma has defined "fundamental error" in a manner that applies precisely to the instant case:

'Fundamental errors' are those which go to the foundation of the case, or which take from the defendant a right which was essential to his defense.

Tucker v. State, 675 P.2d 459, 461 (Okla. Crim. App. 1984) (emphasis added)

^{1/} The exception for fundamental error is also noted in many cases where the error is held not to have been fundamental. See, e.g., Cole v. State, 647 P.2d 446, 447 (Okla. Crim. App. 1982); Garcia v. State, 639 P.2d 88, 89 (Okla. Crim. App. 1981); Hawkins v. State, 569 P.2d 490, 493 (Okla. Crim. App. 1977); Hurley v. State, 416 P.2d 967, 971-72 (Okla. Crim. App. 1966); Brown v. State, 404 P.2d 78, 81 (Okla. Crim. App. 1965).

(reversing conviction because of improper jury instructions that were not objected to).^{2/} There is thus no fair basis for a conclusion that Glen Ake's claim of constitutional error, which was raised before trial as well as on appeal, was not properly before the Oklahoma Court of Criminal Appeals.

Moreover, Oklahoma recognizes that the requirement of a motion for a new trial

is founded upon the rationale that the trial court should be given an opportunity to intelligently consider and pass upon the alleged errors prior to the rendition of the judgment and sentence. It is reasoned that if the trial court is appraised of the commission of prejudicial errors, then he [sic] will

^{2/} This Court has defined fundamental error along similar lines: "[I]f the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 160 (1936).

correctly grant a new trial, thus obviating the necessity of the costly expense of an unnecessary appeal to this Court.

Robinson v. State, 444 P.2d 845, 847

(Okla. Crim. App. 1968). Accord

McFarthing v. State, 630 P.2d 324, 325

(Okla. Crim. App. 1981) ("Since the trial court was never given an opportunity to rule on the matter, it was not properly preserved for review").

It follows that where, as here, the trial court faithfully applied state law and could not have granted the relief sought even if it had been requested in a motion for a new trial, requiring such a "patently futile" motion to be filed serves only the illegitimate purpose of placing pointless procedural obstacles in the path of a criminal defendant attempting to obtain federal review of substantial constitutional claims.

Obstacles of that sort are "plainly inadequate to bar [this Court's] review of the federal question presented."

Douglas v. Alabama, 380 U.S. 415, 422, 423 (1965).^{3/}

CONCLUSION

For the foregoing reasons, petitioner's constitutional claim of a right to expert psychiatric assistance

^{3/} Appeals to the Oklahoma Court of Criminal Appeals are appeals as of right. See Okla. stat. tit. 22 § 1051 (1981); Johnson v. State, 155 P.2d 259, 260 (Okla. Crim. App. 1945). If the State arbitrarily applied or refused to apply its fundamental error rule in such appeals it would be "making the sort of 'unreasoned distinction' the United States Constitution forbids." Note, Criminal Procedure: Oklahoma's Motion for New Trial in Criminal Cases, 36 Okla. L. Rev. 888, 900 (1983), citing Williams v. Oklahoma City, 395 U.S. 458, 459 (1969). In a capital case, such arbitrary distinctions also violate the Eighth Amendment and this "Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

or examination was not waived, and was therefore not disposed of upon an adequate and independent state ground of decision. This Court's jurisdiction was thus properly invoked to review petitioner's claim.

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